

v. 2433  
No. 11101

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a Corporation,

Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA, Hus-  
band and Wife,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Nevada

FILED

OCT 30 1945

PAUL P. O'BRIEN,  
CLERK



No. 11101

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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COMPANY, a Corporation,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

MESSRS. LONG & LEVIT,

Merchants Exchange Building,  
San Francisco, California.

MESSRS. HAWKINS, RHODES & HAWKINS,

153 North Virginia Street,  
Reno, Nevada,

For the Appellant.

WILLIAM S. BOYLE, ESQ.,

Gazette Building,  
Reno, Nevada,

For the Appellee. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,  
Plaintiffs,

vs.

MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a corporation,  
Defendant.

### STIPULATION

It is hereby stipulated by and between William S. Boyle, Esq., attorney for Silvo Questa and Jennie Questa, husband and wife, plaintiffs and Long and Levit, attorneys for Milwaukee Mechanics' Insurance Company, a corporation, defendant that plaintiff may file an amended complaint in the above entitled action and serve a copy of the said complaint as amended upon defendant's attorney.

It is further stipulated that the defendant may have ample time to file their answer.

Dated October 26, 1943.

(S) WILLIAM S. BOYLE

Attorney for Plaintiffs

(S) LONG & LEVIT

Attorneys for Defendant.

[Endorsed]: Filed Nov. 1, 1943. [2]

[Title of District Court and Cause.]

## AMENDED COMPLAINT

Come now the plaintiffs after stipulation entered into by attorneys for plaintiff and defendant and file their amended complaint and for cause of action allege:

### I.

That the defendant, Milwaukee Mechanics' Insurance Company, is a corporation duly organized and existing under and by virtue of the State of Wisconsin and licensed to do business within the State of Nevada.

### II.

That the plaintiffs are citizens of the State of Nevada and the defendant is a citizen of the State of Wisconsin; that the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

### III.

That on August 1st, 1941, and for a long time prior thereto and at all times mentioned in this complaint the plaintiffs Silvo Questa and Jennie Questa were husband and wife and ever since have been and now are husband and wife.

### IV.

That on the 1st day of August, A. D. 1941, Silvo Questa for plaintiffs applied to Frank Hassett, Esq., who was then and [3] there the duly authorized agent of the defendant, for insurance in the sum of Seventy-five Hundred Dollars (\$7500.00) against

loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and the defendant by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs' Glendale Ranch from the 1st day of August, A. D. 1941 for a space of three years and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefore in the usual form of policy issued by them insuring said plaintiffs' barn for the sum of Seventy-five Hundred Dollars (\$7500.00) against loss and damage by fire.

#### V.

That thereafter to wit, on about September 20, 1941 the said barn was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of Seventy-five Hundred Dollars (\$7500.00).

#### VI.

That the defendant neglected and refused and still refuses, to execute and deliver their said policy of insurance in writing to the plaintiffs in pursuance to said agreement.

#### VII.

That the plaintiffs have duly performed all of the conditions of said agreement and insurance on their part to be performed and on or about the 24th day of September, 1941, notified the defendant of said

loss, and on the 8th day of January, A. D. 1942 duly furnished the defendant with proofs of loss.

VIII.

That although more than fifty (50) days have elapsed since said proofs were furnished, no part of said loss has been [4] paid, and the whole thereof remains due and payable to the plaintiffs, the defendant having rejected the said claim in writing.

IX.

That the actual cash value of the property consisting of the barn aforesaid and which was destroyed by fire as aforesaid was on the date of the fire aforesaid in excess of ten thousand dollars.

Wherefore, plaintiffs pray judgment against the defendant.

1. That the defendant corporation deliver its policy of insurance to the plaintiffs in the sum of Seventy-five Hundred Dollars (\$7500.00) on that certain large barn which was situate on the Glendale ranch of plaintiffs.

2. That the plaintiffs are entitled to the sum of Seventy-five Hundred Dollars (\$7500.00) provided for in said policy.

3. That the plaintiffs be given judgment for their costs.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

State of Nevada,  
County of Washoe—ss.

Silvo Questa, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; That he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

### SILVO QUESTA

Subscribed and sworn to before me this 26th day of October, 1943.

[Seal]                      WILLIAM S. BOYLE

Notary Public in and for the County of Washoe,  
State of Nevada.

[Endorsed]:    Filed Nov. 1, 1943. [5]

---

[Title of District Court and Cause.]

### MOTION TO DISMISS AMENDED COMPLAINT

The defendant moves the Court as follows:

To dismiss the action because the Amended Complaint fails to state a claim against defendant upon which relief can be granted.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By ROBERT Z. HAWKINS

Attorneys for Defendant.



NOTICE OF MOTION

To William S. Boyle, Esq., attorney for plaintiffs,  
204 Gazette Building, Reno, Nevada:

Please take notice that the undersigned will bring the above motion on for hearing before the above-entitled court in the Courtroom of the United States District Court in Carson City, Nevada, on the first subsequent law and motion day hereafter, to wit, on the 7th day of February, 1944, at 10 o'clock [6] in the forenoon of that day, or as soon thereafter as counsel can be heard.

At the time of the hearing the defendant will use and rely upon the following:

The amended Complaint of plaintiff;

The above and foregoing Motion to dismiss the action because the amended Complaint fails to state a claim against defendant upon which relief can be granted, for the reason that the alleged contract is invalid under the statutes of the State of Nevada;

Nevada Compiled Laws, Section 3656.117; Salquist v. Oregon Fire Relief Assn., 197 Pac. 312; and other authorities to the same effect.

Dated this 5th day of January, 1944.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By ROBERT Z. HAWKINS

Attorneys for Defendant.

Service of the above and foregoing Notice of Motion and Motion to dismiss Amended Complaint, by copy, is hereby acknowledged this 5th day of January, 1944.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 7, 1944. [7]

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[Title of District Court and Cause.]

March 31, 1944

### MINUTES OF COURT

Defendant's motion to dismiss amended complaint having been argued, submitted on briefs and by the Court taken under advisement, It Is Ordered that the motion to dismiss the amended complaint be, and the same hereby is, denied and the defendant is granted 20 days from and after this day within which to answer said amended bill of complaint.

---

[Title of District Court and Cause.]

### ANSWER TO AMENDED COMPLAINT

Now Comes defendant above named, and answers the amended complaint of plaintiffs herein as follows:

#### I.

Defendant denies each and every allegation contained in paragraph IV of said amended complaint,

except that defendant admits that Frank Hassett was a duly authorized agent of defendant during all of the times mentioned in said amended complaint. Defendant alleges that the usual form of policy insuring against fire issued by defendant in the State of Nevada is, and at all times mentioned in said amended complaint was, as prescribed by the "Nevada Insurance Act," Article 15, Section 117, which Act adopts a standard fire policy for use in the State of Nevada. [9]

## II.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V and IX of said amended complaint, and therefore denies said allegations.

## III.

Defendant admits the allegations of paragraph VI of said amended complaint; except that defendant denies that there was any neglect on its part or that its refusal to execute or deliver any policy of insurance to plaintiffs was contrary to said or any agreement.

## IV.

Defendant admits that on or about September 24, 1941, plaintiffs notified defendant that the barn referred to in said amended complaint was burned on or about September 20, 1941; and defendant admits that on January 8, 1942, plaintiffs furnished defendant with a document entitled "Proof of Loss;" defendant denies each and every other al-

legation contained in paragraph VII of said amended complaint.

V.

Defendant admits that it has paid nothing to plaintiffs and has rejected their claim in writing; defendant denies that the whole or any part of said or any loss or any amount whatever remains or is or at any time was due or payable to plaintiffs or either of them; defendant alleges that the elapsed time between the date when said "Proof of Loss" was furnished to defendant on January 8, 1942, and the date of the commencement of this action on February 27, 1942, was and is fifty days.

For a Separate and Affirmative Defense, defendant alleges:

I.

That the usual form of policy insuring against fire [10] issued by defendant in the State of Nevada is, and at all times mentioned in said amended complaint was, as prescribed by the "Nevada Insurance Act," Article 15, Section 117, which Act adopts a standard fire policy for use in the State of Nevada; that it is provided in said standard policy as follows:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment,

estimate, and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required.”

II.

That this action was commenced on February 27, 1942, less than sixty days after plaintiffs furnished to defendant a document purporting to be “Proof of Loss” on January 8, 1942.

Wherefore, defendant prays that plaintiffs take nothing by their amended complaint herein, and that defendant be dismissed hence with its costs of suit herein incurred.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Service of the within Answer to Amended Complaint by copy, is admitted April 24th, 1944.

W. S. BOYLE

Attorney for Plaintiffs. [11]

State of California,

City and County of San Francisco—ss.

Frank E. Chadwick, being first duly sworn, deposes and says:

That he is an officer, to-wit, Second Vice President of Milwaukee Mechanics' Insurance Company, a corporation, the defendant named in the foregoing answer and as such is duly authorized to make this

verification for and in its behalf; that he has read the said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

FRANK E. CHADWICK

Subscribed and sworn to before me, this 22nd day of April, 1944.

[Seal]

KATHRYN E. STONE

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 25, 1944. [12]

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[Title of District Court and Cause.]

### REPLY

Comes now the plaintiff and in reply to separate and affirmative defense plaintiff admits and alleges:

1.

Admits all of paragraph I of defendant's separate and affirmative defense.

2.

Admits all of paragraph II of defendant's separate and affirmative defense.

Plaintiff further replying to defendant's separate and affirmative defense alleges:

That defendants on February 20, 1942, waived the sixty days' time when they denied the existence



of any liability or insurance on their part express or implied on the barn of plaintiffs referred to in their complaint on file, herein by its letter to plaintiff reading as follows:

Law Offices  
Long and Levit  
Merchants Exchange  
San Francisco

February 20, 1942

William S. Boyle, Esq.  
Attorney at Law,  
Gazette Building,  
Reno, Nevada.

Re: File #1552—Silvo Questa,  
Reno, Nevada;  
Fire Loss.

Dear Mr. Boyle:

Please be advised that our client Milwaukee Mechanics' Insurance Company denies that it is under any liability whatever to your clients Silvo Questa and Jennie Questa, or to either of them, for loss by fire to their barn occurring on or about September 21, 1941. Said Insurance Company expressly denies the existence of any contract of insurance, written or oral, between it and your clients or either of them, at the time of said fire or at any other time.

Yours very truly,  
LONG & LEVIT

BWL:MC

Wherefore plaintiffs pray that the prayer of defendant's separate and affirmative defense be denied and that plaintiffs be awarded the relief demanded in their amended complaint.

SILVO QUESTA

Plaintiff

State of Nevada,  
County of Washoe—ss.

Silvo Questa, one of the plaintiffs herein, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; That he has read the foregoing Reply and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

SILVO QUESTA

Subscribed and sworn to before me this 26th day of April, 1944.

[Seal]

WILLIAM S. BOYLE

Notary Public, in and for the County of Washoe,  
State of Nevada.

[Endorsed]: Filed April 27, 1944. [14]

---

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

I am satisfied that the defendant agreed to insure plaintiff's barn in the sum of \$7500.00 subject to



modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such appraisal, defendant was bound, as if it had issued the policy, to pay the actual loss, not exceeding \$7500.00. I am satisfied from the evidence that the actual amount of loss was the sum of \$4200.00.

Judgment for plaintiff in the sum of \$4200.00 and costs of suit. Findings should be presented in due course.

Dated: February 15, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Feb. 17, 1945. [15]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly to be heard before the above-entitled Court on December 4 and 5, 1944, the plaintiffs appearing in person and by their attorney, William S. Boyle, Esq., and the defendant corporation appearing by its attorneys, Long and Levit, by Bert W. Levit, Esq., of San Francisco, and Hawkins, Rhodes and Hawkins, by Robert Z. Hawkins, Esq. The plaintiffs offered evidence both oral and documentary in support of their Complaint, and the defendant corporation offered evidence both oral and documen-

tary in support of its Answer, and both sides rested and the matter was submitted to the Court after Briefs had been filed January 17th, 1945. The Court having been fully advised on all phases of the matter by respective counsel, and now, after due deliberation, the Court finds the following facts:

#### I.

That the defendant, Milwaukee Mechanics' Insurance Company is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and licensed to do business within the State of Nevada.

#### II.

That the plaintiffs are citizens of the State of Nevada, [16] and the defendant is a citizen of the State of Wisconsin; That the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

#### III.

That on August 1st, 1941, and for a long time prior thereto, and at all times mentioned in this Complaint, the plaintiffs, Silvo Questa and Jennie Questa, were husband and wife and ever since have been and now are husband and wife.

#### IV.

That on the 1st day of August, A. D. 1941, Silvo Questa, for plaintiffs, applied to Frank Hassett, Esq., who was then and there the duly authorized agent of the defendant, for insurance in the sum of

Seventy-five Hundred Dollars (\$7,500.00) against loss or damage by fire, subject to modification of said amount if defendant subsequently appraised the property at a lower figure. The plaintiffs applied for insurance as aforesaid upon a large barn situated on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs and the defendant, by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with the defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs Glendale Ranch from the 1st day of August, A. D. 1941, for a space of three years, and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefore in the usual form of policy issued by them insuring said plaintiffs barn for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) against loss and damage by fire.

#### V.

That thereafter, to-wit, on about September 20, 1941, the said barn was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of Four Thousand Two Hundred Dollars (\$4,200.00).

#### VI.

That the defendant neglected and refused and still refuses to execute and deliver their said policy of insurance in writing to the plaintiffs in pursuance to said agreement.

## VII.

That the plaintiffs have duly performed all of the conditions of said agreement and insurance on their part to be performed, and on or about the 24th day of September, 1941, notified the defendant of said loss, and on the 8th day of January, A. D. 1942, duly furnished the defendant with proofs of loss.

## VIII.

That although more than fifty (50) days have elapsed since said proofs were furnished, no part of said loss has been paid, and the whole thereof remains due and payable to the plaintiffs, the defendant having rejected the said claim in writing.

## IX.

That the actual cash value of the property, consisting of the barn aforesaid and which was destroyed by fire as aforesaid, was on the date of the fire aforesaid in excess of Ten Thousand Dollars (\$10,000.00).

From the Foregoing Facts the Court Legally Concludes:

That *at* an oral contract of fire insurance upon plaintiffs barn existed which was later destroyed by fire, and that the amount of insurance at that time, covered by such oral contract, was a sum not less than Seven Thousand Five Hundred Dollars (\$7,500.00), which amount the Court concludes to be the amount so covered by such oral contract, and that the defendant not having made the appraisal as set forth in Paragraph IV of these Find-

ings, to the effect that the defendant agreed to insure plaintiffs barn in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), subject to modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such [18] appraisement, defendant was bound, as if it had issued a policy, to pay the actual loss, not exceeding Seven Thousand Five Hundred Dollars (\$7,500.00). That the damage sustained by Plaintiffs, by reason of said fire, was Four Thousand Two Hundred Dollars (\$4,200.00), together with costs of suit.

That the plaintiffs are entitled to judgment against defendant, Milwaukee Mechanics Insurance Company, a corporation, in the sum of Four Thousand Two Hundred Dollars (\$4,200.00), together with costs of suit.

Done in Open Court This the 5th Day of March,  
A. D. 1945.

(S) LOUIS E. GOODMAN  
District Judge.

[Endorsed]: Filed March 7, 1945. [19]

In the United States District Court  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,

Plaintiffs,

vs.

MILWAUKEE MECHANICS INSURANCE  
COMPANY, a corporation,

Defendant.

### JUDGMENT

The above-entitled action coming on regularly to be heard before the above Court on December 4th and 5th, 1944, William S. Boyle, Esq., appearing for plaintiffs, and Long and Levit and Hawkins, Rhodes and Hawkins, by Robert Z. Hawkins, attorneys at law, appearing for defendant corporation, and evidence having been introduced by each of the respective parties, and the said cause having been submitted for decision, and the Court, being fully advised, having rendered its Findings of Fact and Conclusions of Law herein, wherein judgment is ordered in favor of plaintiffs and against the defendant:

Now, therefore, by reason of the law and findings aforesaid:

It Is Ordered, Adjudged and Decreed:

That an oral contract of fire insurance existed upon plaintiffs barn, which was later destroyed by fire, and that the amount of insurance at that time,



covered by such oral contract, was a sum not exceeding Seven Thousand Five Hundred Dollars (\$7,500.00), and that the damage sustained by plaintiffs, by reason of said fire, was not less than Four Thousand Two Hundred Dollars (\$4,200.00). [20]

That the plaintiffs have judgment against defendant, Milwaukee Mechanics Insurance Company, a corporation, in the sum of Four Thousand Two Hundred Dollars (\$4,200.00), with cost of Court herein taxed at \$41.00.

Done in Open Court This the 5th Day of March,  
A. D. 1945.

/s/ LOUIS E. GOODMAN

District Judge

[Endorsed]: Filed March 7, 1945. [21]

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given That Milwaukee Mechanics' Insurance Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about March 7, 1945.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Receipt of a copy admitted this 16th day of April, 1945.

/s/ WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed April 28, 1945. [22]

---

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Milwaukee Mechanics' Insurance Company, a corporation, as Principal, and Commercial Casualty Insurance, a corporation organized and existing under the laws of the State of New Jersey and duly authorized to act as Surety, with its principal office located in the City of Newark, as Surety, are held and firmly bound unto Silvo Questa and Jennie Questa, husband and wife, in the full and just sum of Five Thousand Dollars (\$5,000.00) to be paid to said Silvo Questa and Jennie Questa, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. [23]

Sealed with our seals and dated this 10th day of April in the year of our Lord One Thousand Nine Hundred and Forty-five.

Whereas, lately at a District Court of the United States for the District of Nevada in a suit pending in said Court, between Silvo Questa and Jennie Questa, husband and wife, as Plaintiffs' and Mil-



Milwaukee Mechanics' Insurance Company, a corporation, as Defendant, a judgment was rendered against the said Milwaukee Mechanics' Insurance Company, and the said Milwaukee Mechanics' Insurance Company having filed or being about to file in said Court a notice of appeal to reverse the judgment in the aforesaid suit, Silvo Questa and Jennie Questa, husband and wife, as Plaintiffs, versus Milwaukee Mechanics' Insurance Company, a corporation, as Defendant, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Milwaukee Mechanics' Insurance Company shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, if Milwaukee Mechanics' Insurance Company fails to make its plea good, then the above obligation to be void; else to remain full force and virtue.

[Seal]                   MILWAUKEE MECHANICS'  
INSURANCE COMPANY

By FRED W. SULLIVAN  
Vice President

[Seal]                   COMMERCIAL CASUALTY  
INSURANCE COMPANY

By D. W. PORTER  
Attorney-in-Fact

Form of bond and sufficiency of surety approved

WILLIAM S. BOYLE

Attorney for Plaintiffs.

FRANK H. NORCROSS

District Judge. [24]

State of California,

City and County of San Francisco—ss.

On this 10th day of April in the year One Thousand Nine Hundred and Forty-five before me, James Allen, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared D. W. Porter, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Commercial Casualty Insurance Company (a Corporation) and acknowledged to me that he subscribed the name of said Corporation thereto as surety and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

/s/ JAMES ALLEN

Notary Public In and For the City and County of  
San Francisco, State of California.

My Commission Expires December 21, 1946.

Cas. Bonding 5989-10794

[Endorsed]: Filed April 28, 1945.

[Title of District Coura and Cause.]

APPELLANT'S DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

Milwaukee Mechanics' Insurance Company, a corporation, defendant and appellant herein, hereby designates the complete record and all the proceedings and evidence in the above entitled action for inclusion in the record on appeal herein.

Dated: April 11, 1945.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Receipt of a copy admitted this 16th day of April, 1945.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed April 28, 1945. [25]

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[Title of District Court and Cause.]

STIPULATION RE TRANSCRIPT AND  
EXHIBITS

It Is Hereby Stipulated that defendant and appellant need not file two copies of the reporter's transcript of the evidence and proceedings at the trial (as required by Rule 75,b, of the Rules of Civil Procedure); one copy thereof shall suffice.

It Is Further Stipulated that, in order to save expense, the Clerk of the District Court need not copy the exhibits introduced or offered at the trial, but may transmit the original exhibits as a part of the record on appeal to the Circuit Court of Appeals.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

LONG & LEVIT

HAWKINS, RHODES &  
HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

So Ordered:

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed April 28, 1945. [26]

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[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR  
FILING RECORD ON APPEAL

It is hereby stipulated and agreed by and between the above-named plaintiffs and defendant, acting by and through their undersigned attorneys of record, that the time for filing the record on appeal in the above entitled action in the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including July 23, 1945.

/s/ WILLIAM S. BOYLE

Attorney for Plaintiffs

Dated: June 5, 1945.

/s/ ROBERT Z. HAWKINS

for

HAWKINS, RHODES &  
HAWKINS

Attorneys for Defendant

Pursuant to the above Stipulation, and Good Cause Appearing Therefor, it is hereby ordered that the time for filing the record on appeal in the above-entitled action and docketing the action be, and the same hereby is, extended to and including July 23, 1945.

Dated: June 5th, 1945.

/s/ ROGER T. FOLEY

District Judge.

[Endorsed]: Filed June 5, 1945. [27]

In the District Court of the United States,  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,

Plaintiffs,

vs.

MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a corporation,

Defendant.

Before: Hon. Louis J. Goodman,  
Judge.

### TRIAL

Be It Remembered, That the above-entitled matter came on regularly for hearing before the court, sitting without a jury, on Monday, the 4th day of December, 1944, at Reno, Nevada, Hon. Louis J. Goodman, Judge, presiding.

#### Appearances:

Wm. S. Boyle, Esq.,

Attorney for Plaintiffs.

Long & Levit, by Bert W. Levit, Esq.

Hawkins, Rhodes & Hawkins, Esq., by Robert  
Ziemer Hawkins, Esq.,

Attorneys for Defendant.

The following proceedings were had:

The Court: Do you want to make a statement,  
Mr. Boyle?

Mr. Boyle: Yes, your Honor. This is a case, the



plaintiffs are Silvo Questa and Jennie Questa, husband and wife, vs. Milwaukee Mechanics' Insurance Company, and the case is predicated upon the action that the defendant corporation deliver [30] a policy of insurance to the plaintiffs in the sum of \$7500, which was on a certain large barn out on their ranch and also that the plaintiffs are entitled to the sum of \$7500 provided for in said policy, which they allege was to be delivered to them by Mr. Hassett, a representative of the Milwaukee Mechanics' Insurance Company.

Now the plaintiffs will prove that the controversy exceeds three thousand dollars and that the plaintiffs are citizens of the State of Nevada and the defendant is a citizen of the State of Wisconsin. That about August 1, 1941, and for a long time prior thereto, that Silvo Questa and Jennie Questa were husband and wife, and on the 1st day of August, 1941, Silvo Questa, for plaintiffs, applied to Frank Hassett, who was then and there the duly authorized agent of the defendant, for insurance in the sum of \$7500 against loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and that the defendant, by their agent, in consideration of the premises, which was to be the same rate as all other insurance held by the plaintiffs with defendant, to be paid defendant by plaintiffs, agreed to insure the plaintiffs on said large barn on the plaintiffs' Glendale Ranch from the 1st day of August, 1941, for a space of three years, and to

execute and deliver to the plaintiffs, within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by them insuring plaintiffs' barn for the sum of \$7500. Now in that respect we will state that we will prove that Mr. Hassett was the insurance agent who transacted all the business of Silvo Questa and Jennie Questa, as far as insurance was concerned, and they had an agreement between them that all that was necessary for Mr. Questa to do was to call up Mr. Hassett and tell him that they had something they wanted to insure. Now it may be an automobile or it may be a barn, or it may be some hay, or may be some onions, may be anything on a ranch and Mr. Hassett then, as agent for the company, would go down there to the ranch and it was understood that Mr. Hassett would insure it, that he would then insure the matter and present to him the amount that he insured it for and if it was too little they would argue it and they would raise it. If it were too much, they would argue it again and they would lower it, until they reached the value which they believed it was worth, and that is the insurance that should be placed upon the barn. That thereafter Mr. Hassett agreed to insure the barn in the manner which I have explained and he failed to deliver the policy to Mr. Questa and that on the 20th day of September, 1941, said barn was totally destroyed by fire, whereby the plaintiffs sustained a loss in the amount of \$7500. Now, your Honor, we maintain and will prove, plaintiffs will prove, that the value of the barn at the time it burned was between



10 and 15 thousand dollars and that the plaintiffs have performed all the conditions of their agreement, but the defendant refuses, and still refuses, to deliver the policy, and more than 50 days have elapsed, etc., since the notice of loss. Milwaukee Mechanics' [32] Insurance Company was served with a notice of loss, but as alleged in here, more than 50 days have elapsed since said proofs were furnished and no part of said loss has been paid and the whole thereof remains due and payable to the plaintiffs, the defendants having rejected the said claim in writing, and irrespective of that, your Honor—it is not the proper time for argument, but I might state—inasmuch as plaintiffs are asking for delivery of policy, the plaintiffs can not very well be bound by the policy that was not delivered to them, even though the State law might require that policy of insurance be in writing, according to the general laws that have been adopted now throughout this country, that policies of insurance must be in writing; but, however, I maintain that if you don't deliver a policy that you are not bound by the terms of a policy that is not delivered to you, and our action is predicated upon the delivery of that policy of insurance in the usual form of the Milwaukee Mechanics' Insurance Company and that the amount of damage suffered as a result of not delivering it was \$7500, and that is the amount we will prove the barn was worth at the time of the fire.

The Court: Are you relying on the policy of insurance or are you relying upon the agreement?

Mr. Boyle: Well, we are relying upon the insurance. We are relying upon the usual form of policy that the company makes out. We are relying upon that.

The Court: I gather from what you say that cause of [33] complaint is that you didn't get the policy.

Mr. Boyle: We did not get the policy.

The Court: And if you had got the policy you would have the insurance?

Mr. Boyle: We would have had the insurance.

The Court: And then under the terms of the policy you would be entitled to collect because you had a loss?

Mr. Boyle: Exactly; and we maintain, according to the authorities when you sue in an action of this kind, you sue both for delivery of policy and damage suffered and by virtue thereof both may be joined together and tried at the same time.

The Court: I haven't read the decision. I understand this is the second trial.

Mr. Boyle: This is the second trial of this action, your Honor. The decision of the Circuit Court of Appeals reversed the lower court when Judge Norcross had given a judgment for the sum of four thousand dollars to the plaintiffs.

The Court: Is there any question of fact that is going to be disputed at this trial, other than the amount of loss?

Mr. Boyle: When we started the action, we thought we would go to trial and consider it on the same premises as we did the first trial, but for some

reason or other we were deluged by a great many motions and demurrers, etc.

The Court: I mean by that, witnesses that have testified [34] at the previous trial with reference to the agreement, etc., are not going to come here and testify to different facts than they had there?

Mr. Boyle: I do not think they will.

The Court: That is why we are asking the question. Is it necessary to take the testimony of witnesses over again?

Mr. Boyle: I think it will be, yes. We have additional witnesses. We have at least four other witnesses that will testify as to various matters that came up even since that trial, certain matters that were raised by the defendant.

The Court: Was there any conflict in the testimony at the first trial?

Mr. Boyle: Plenty of it.

The Court: As to whether there was this agreement of insurance?

Mr. Boyle: Oh, by all means.

The Court: Then, of course, the Court will have to hear their testimony. I thought the case would now result in the question of the law of the Circuit Court decision.

Mr. Levit: May I make a brief statement at this time. So far as the complaint is concerned, and of course the complaint is the basis on which we seek to try the case, this is a suit upon an oral contract of insurance. Paragraph IV is the charging paragraph of the complaint and it is very clear. I am

[35] going to read it. Paragraphs I, II, and III are merely preliminary, in regard to jurisdiction, etc. Paragraph IV reads:

“That on the 1st day of August, A. D. 1941, Silvo Questa for plaintiffs applied to Frank Hassett, Esq., who was then and there the duly authorized agent of the defendant, for insurance in the sum of Seventy-five Hundred Dollars (\$7500.00) against loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and the defendant by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs' Glendale Ranch from the 1st day of August, A. D. 1941 for a space of three years and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by the \* \* \* \* ” etc.

In other words, your Honor, there is a specific allegation of an agreement to insure at a specific amount in a specific form for a specific time, made by the mutual agreement between the parties, and this suit is obviously a suit on that policy, that oral contract of insurance, because no written contract was ever issued. Now the issue is made, of course, on that paragraph. We admit the agency of Mr. Hassett, who is mentioned in the paragraph, [36] and we deny all of the other allegations in the para-

graph; that is, we deny the agreement. Now the only other important allegation——

The Court: That is, if the evidence would sustain the plaintiffs' contention that the agreement was made, then that would end the matter, except for the amount of damages?

Mr. Levit: That is corret, your Honor. In other words, the first question is, was or was there not an oral contract of insurance? Now the other issue in the case, the other and primary issue in the case, is the question, if there was such a contract of insurance, what, if any, was the amount of loss and damage.

The Court: Then we can limit this just to the testimony on those two issues, can we not?

Mr. Levit: I think factually those are the only issues.

The Court: Will you agree to that, Mr. Boyle?

Mr. Boyle: I will agree to anything that will expedite it; at the same time, there are many things that have come up since the last hearing in the Circuit Court of Appeals that have been raised and we do not want to leave those unanswered at this time, so the record will show those in the event they are raised again. We would like to clear those matters up. There are various things, such as value of the barn at the date of the fire. We maintain, and had witnesses at the time of the last hearing, whom I believe are present and have important testimony [37] as to the replacement value of the barn and Mr. Levit raised considerable objection to that on the ground that the findings should show the value



of the barn on the day it was burned, so those are the things we are trying to obviate this time by bringing up all the matters which he objected to and clearing up any loopholes that might remain.

The Court: Of course that matter you refer to is part of the question of value of the property at the time of the loss.

Mr. Boyle: That is it.

The Court: I think we have that cleared up. You may go ahead and put on your evidence.

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### SILVO QUESTA,

being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Boyle:

Q. What is your name please?

A. Silvo Questa.

Q. Where do you reside?

A. R. F. D. 2, Box 102, Reno, Nevada.

Q. How long have you lived there?

A. Since 1919.

Q. Are you a citizen of Nevada?

A. Yes sir.

Q. Do you know, of your own knowledge, where the defendant is a citizen of?      A. Wisconsin.

Q. Who is Jennie Questa? [38]

A. My wife.

Q. Were you husband and wife during August, 1941?      A. Yes sir.

(Testimony of Silvo Questa.)

Q. What, to your recollection, occurred on the first day of August, 1941, if you remember, pertaining—

A. (Interrupting): I applied to Frank Hassett, who was agent for the Milwaukee Mechanics' Insurance Company, for insurance of \$7500. against loss or damage by fire on a large barn situated at the Glendale Ranch in Washoe County, Reno, Nevada, belonging to me and my wife.

Q. Do you know Frank Hassett? A. Yes.

Q. How well do you know him?

A. I am very well acquainted with Mr. Hassett. He is my insurance agent. He insures anything I desire to insure.

Q. Just a second. You say that he insures anything that you desire to be insured. Have you any agreement with him relating to your insurance?

A. Yes.

Q. Is it in writing or not? A. No.

Q. What agreement have you between you and him pertaining to insurance?

Mr. Levit: If the Court please, I am going to object to the question on the ground it does not appear to be relevant to any issue in the case. In the first place, there is no showing [39] when the agreement was made. For all that appears, it might be an agreement subsequent to the time mentioned, August 1, 1941, because Mr. Questa has testified that Mr. Hassett is his insurance agent and handles all his insurance; and in the second place, the agreement with which we are concerned here is a specific

(Testimony of Silvo Questa.)

definite agreement alleged to have been made on August 1, 1941, and therefore we object to this testimony.

The Court: Counsel, why do you have to show anything more than the particular agreement?

Mr. Boyle: May it please the Court, I could produce authorities, and I think at the time of argument we will produce them, to the effect that where a man has been dealing in insurance, the conditions are altogether different, just casually walking up to a man and saying, "I want you to insure my barn, write my insurance up", to where you have been transacting business with a man. With an insurance man or agent a different condition exists.

The Court: Do you have to go into that in order to prove the particular agreement? I do not suppose these gentlemen would raise any point that this Mr. Hassett wrote insurance for the plaintiff. What do you hope to gain by that?

Mr. Boyle: We want to show the relationship of agent that exists between them and what that relationship was and how far it extended.

The Court: You mean you are going to try to show that there [40] was no specific direction to write this particular insurance, but just the agent had authority to put on any amount of insurance?

Mr. Boyle: No, I am endeavoring to bring out the relationship that existed between Mr. Questa and Mr. Hassett a long time previous to this insurance.



(Testimony of Silvo Questa.)

The Court: Do we have to go over all of that? Is there any issue on that?

Mr. Boyle: There was issue on everything all during this trial. That is why it took about 4 days to try it.

The Court: Did counsel for the defendant have any point in mind? What difference does it make whether he was his agent for a long time or not?

Mr. Boyle: They deny any relationship existing and they deny the contract and we desire——

The Court: I understand they deny the particular agreement in this case, but it may not follow from that they deny there has been a general relationship of insurance agent and principal between the witness and this Mr. Hassett.

Mr. Levit: Your Honor, I would like to say that we interposed objection to a specific question. We are not going to object to specific deals between Mr. Questa and Mr. Hassett prior to the making of this purported agreeemnt, if counsel wishes to bring those out. That was not the question that was asked before. [41]

The Court: Yes, I know the question asked was whether or not there was an agreement. I will sustain the objection to that question. I would like to have this case move along a little more rapidly.

Q. (By the Court): Was this man your insurance agent for a long time?           A. Yes sir.

Q. (By the Court): He wrote a lot of your insurance for a long time?           A. Yes.

(Testimony of Silvo Questa.)

Mr. Boyle: That is the point I wanted to bring out. I also wanted to bring out the manner in which they transacted their business, how they came to closing up insurance.

The Court: Ask the next question. I don't know what you have in mind.

Q. Now with relation to Mr. Hassett as to your insurance agent, how do you usually carry on your insurance business, explain to the Court?

Mr. Levit: We object unless it is limited to the date prior to the conversation.

The Court: I will sustain the objection to the extent counsel stated, limiting it to the time prior to the agreement in question.

Q. All right, that is what we intended anyway.

A. Mr. Hassett and I had agreed that he would write all my insurance, [42] not once, but many times. It was agreed that all I had to do was to call him up or call on him and he would insure anything I desired. We had an understanding that he would go to the ranch and insure it and if it was too little, we would raise it; if it was too high, we would lower it, and so on until we struck the right value.

Mr. Boyle: That was merely to explain, your Honor, the manner in which they carried on their business.

The Court: All right.

Q. Now with relation to the insurance that you mentioned on October 1, 1941, where did you meet

(Testimony of Silvo Questa.)

Frank Hassett, the agent, if you met him, at that time?      A. August 1st?

Q. Yes, on August 1st.

A. I met him on the street, on Virginia Street.

Q. Did you have any conversation with him at that time when you met him?      A. Yes.

Q. Who was present?

A. Mr. Hassett and myself.

Q. Do you remember the exact meeting place at that time?

A. On Virginia Street near Colbrandt's.

Q. What time was it?

A. Between 11:30 and 12:00 o'clock.

Q. What, if anything, was said, if you recollect?

A. I asked in regard to insuring the barn for three years for [43] \$7500. in the usual form with the usual policy issued to me on other property.

Q. Do you remember any other conversation at that time?

A. I called his attention, referring to Brown Motors Company, that I had purchased a station wagon, International, if he had insured the car. He said that he had insured the car.

Q. What further occurred, if you recollect?

A. Mr. Hassett assured me that he would insure the barn and that he would come down to the ranch and see the barn, as I believed it should carry the full insurance of \$7500. Mr. Hassett agreed he would insure it for \$7500 and he would deliver me the policy with the policy for the car.

Q. Did Mr. Hassett go to the ranch?

(Testimony of Silvo Questa.)

A. Yes, he went to the ranch in my absence and talked to my wife.

Q. Now, to your knowledge, did he see the barn?

A. He couldn't help but see the barn.

Q. Now what, if anything, was done about insurance at that visit of Mr. Hassett's?

A. He spoke to my wife and visited my home and then left.

Mr. Levit: We move that be stricken as hearsay.

The Court: He can testify to anything that was said.

Mr. Levit: He wasn't present, I believe, your Honor.

Q. Now when did you hear from Mr. Hassett, if you ever did, again?

A. I met him on the street, on Virginia Street, along about [44] one o'clock in the middle of August, and I again asked him about the insurance policy. He said that he would take care of it.

Q. Did you see him any time thereafter?

A. I met him at the Riverside bar along about 7:30 in the evening along about the last part of August or the first part of September, 1941.

Q. Did you speak to him? A. Yes.

Q. And was he alone or with other people?

A. He was sitting down with some people and as I walked by I asked him about the policy.

Q. What, if anything, did he say?

A. He said that he would take care of it and that he would come down.

(Testimony of Silvo Questa.)

Q. What, if anything, occurred, if you recollect, after meeting Mr. Hassett at the Riverside bar?

A. On September 20, 1941, the barn burned down, was completely destroyed.

Q. After the barn burned down, did you see Mr. Hassett or communicate with him?

A. Yes.

Q. Where?

A. In his office in the Heitman Building, Reno.

Q. Who were present?

A. Mr. Hassett and myself.

Q. What time was it? [45]

A. It was early in the afternoon, about four days after the fire, for I expected Mr. Hassett to show up at the ranch.

Q. What was the conversation had between you and Mr. Hassett, if you recollect?

A. I asked Mr. Hassett if he had my policy of insurance on the barn. I told him that the barn had burned down. Mr. Hassett said for me not to worry, that it was his worry from then on and then he put his hand to his head and said, "Oh, Jesus, it is all my fault. Don't you worry; let me do the worrying. I have been so busy running back and forth to Las Vegas, Nevada."

Q. Did you have any other business with him thereafter?

A. Yes.

Q. What?

A. I insured a box stall barn and little saddle room and called his attention to the stone house, supposed to be insured for four thousand dollars at the same time the barn was insured.

(Testimony of Silvo Questa.)

Q. Did he deliver the policies? A. Yes.

Q. After he delivered the last policies, what, if anything, occurred about the barn?

A. I insured some onions with Mr. Hassett after the barn burned.

Q. Did Mr. Hassett mention the barn insurance thereafter? A. Yes.

Q. When?

A. After New Years, 1942. [46]

Q. Where? A. At his office.

Q. What did he say or what was said?

A. He said that he had talked to his boss and his boss said there was no insurance.

Q. What, if anything, further was said at that time?

A. I says, "Frank, if you think you are going to pull that over on me, you are badly mistaken." I told him I would advertise him, that he had no business doing business in Nevada, he belonged in California. Mr. Hassett said then that he would take me to California and pay all my expenses if I would go with him and talk to his boss.

Q. Did you see Mr. Hassett after that occasion?

A. Yes.

Q. When?

A. On the 26th day of January.

Q. Did you have any conversation with Mr. Hassett at that time?

A. Yes, he said for me to be patient for three days.



(Testimony of Silvo Questa.)

Q. Did you hear from him further?

A. Yes, I met him after the last of January and he said that he had talked to his company and told them to charge it up to advertising and to pay me and he said also in twenty-five years that he had been with the company that he had learned something. He said, "Hereafter when I get an order, I will write it down and if I have to get on the witness stand, I will admit it was [47] an order."

Q. Mr. Questa, I show you a certain small picture and ask you if you recollect that picture and what it is?

A. It is the barn.

Q. And there is also a young lady on a horse, do you know who the young lady is?

A. No, I do not.

Q. Now that is the same one, this picture, showing an enlargement?

A. Yes sir.

Q. It is a true and exact picture of the barn?

A. That is right.

Mr. Boyle: I would like to offer this in evidence.

Mr. Levit: No objection.

The Court: Let it be marked Plaintiff's Exhibit 1.

Q. Now you testified that the smaller picture was a snapshot and the larger one was an enlargement?

A. Yes sir.

Q. Were you familiar with the construction of the barn?

A. Yes sir.

Q. Will you kindly describe it?

A. Well, it was a large barn. It was an old barn,



(Testimony of Silvo Questa.)

built with 10 x 10 and 12 x 12 timbers, all iron braced, grooved and pinned, was in excellent condition, built from big timbers from the mills of Virginia City.

Q. How long have you been in the ranching business? [48] A. All my life.

Q. During your life how many ranches have you lived on? A. Three.

Q. Are you familiar with barns?

A. Yes sir.

Q. Have you ever built barns or had them built for you?

A. I have been around where they built barns.

Q. Have you made a study of barns?

A. Well, I am not a contractor or carpenter either.

Q. What particular value is a barn to a ranch?

A. It is a big value to a ranch.

Mr. Levit: We object and move that the answer be stricken.

The Court: Well, you don't have to waste time on that, I do not believe.

Mr. Boyle: Your Honor, it is important to this degree. You will find the authorities agree with relation to farm lots and acreages, the best testimony you can get on such things is a rancher or a farmer who understands the business of farming and who knows those things and has his own peculiar way of placing a value on it.

The Court: The only question here is how much it is worth.

(Testimony of Silvo Questa.)

Q. Mr. Questa, I asked you the question if you were familiar with barns. Now, were you familiar with that barn on your ranch down on the Glendale Road, known as the Glendale Ranch? A. Yes.

Q. On the morning of the fire and previous thereto? [49] A. Yes.

Q. Have you in mind an opinion as to the value of that barn? A. Yes.

Mr. Levit: As of what time?

Mr. Boyle: I said the morning of the fire and previous thereto.

Q. What would be your opinion of the value of that barn?

A. Fifteen thousand dollars at that time.

Q. (Mr. Levit): At the time of the fire?

A. Yes sir.

Q. (By the Court): How large was this barn?

A. It was over 100 feet long, about 50 or so wide, I can't say the exact feet, and very high, very large. It was known as the largest barn in this county.

Q. (By the Court): What sort of a floor did it have?

A. We had taken the floor out to put cement pillars under, piers.

Q. (Mr. Boyle): I will show you some plans and apparently there are three attached here. This would be apparently the front elevation, would it not?

Mr. Levit: Just a minute before you answer, I want to make an objection.

(Testimony of Silvo Questa.)

Q. Well, I will show you some plans and ask you if you are familiar with those? A. Yes.

Q. You are familiar with them? ([50])

A. Yes sir.

Mr. Boyle: I will offer them for identification, your Honor.

Mr. Levit: No objection if marked for identification.

The Court: Are these supposed to be plans?

Mr. Boyle: Yes, but I want to get the man that drew them.

The Court: Let the plans be marked Plaintiffs' 2 for identification.

Mr. Levit: Your Honor understands that we do not stipulate those are the plans of the barn. They have not yet been identified, just marked for identification.

The Court: Counsel said he will have a witness who will testify to them.

Q. Of your own knowledge, Mr. Questa, without looking at those plans or testifying pertaining to the plans, could you give the dimensions of the barn and give the Court a description as to its height and other qualifications of the barn, if you know?

A. Well, I should judge it was over 100 feet long, I will say 110 or 115 feet long, 50 feet wide, and very high, more than two stories high and then the roof.

Q. Now what, to your knowledge, would be the capacity of that barn with relation to storing hay? How much hay could you put in it?

(Testimony of Silvo Questa.)

A. Well, hundreds of hundreds of tons, besides implements.

Q. And besides hay did you store other things pertaining to the ranch, such as implements? [51]

A. Yes, harness and collars, lots of things.

Q. Now when you spoke to Mr. Hassett about the insurance, did you discuss the premium?

A. We had both talked about it, being with the same company that he insured the house on the ranch, under the same conditions set forth in those policies issued by the Milwaukee Mechanics' Insurance Company. It was customary for Mr. Hassett to prepare the policy and I would accept it, so I relied upon it.

Q. Were you in a position to pay the insurance premium at all times during this transaction?

A. Yes, Mr. Hassett knew that.

Mr. Boyle: You may cross-examine.

#### Cross-Examination

By Mr. Levit:

Q. Mr. Questa, you purchased an automobile from Brown Motors, did you not, about the 25th of July? A. Yes.

Q. And I believe you said in your first conversation with Mr. Hassett on August 1st that this automobile was also a subject of discussion?

A. Mr. Hassett had called up the ranch a few days after I had purchased the station wagon and asked me if I would let him have all the insurance on the station wagon, for me to call up Brown Mo-

(Testimony of Silvo Questa.)

tors and tell Brown Motors to give Frank Hassett all the insurance on the car. [52]

Q. I don't think you understood my question. I am asking if it is not a fact that on direct examination you testified that at that conservation on August 1st you discussed with Mr. Hassett the matter of insurance on this station wagon?

A. I asked him if he had insured the car.

Q. Yes. Now you told us on that occasion you discussed also insurance on the stone house?

A. Yes sir.

Q. That is correct, is it? A. Yes sir.

Q. And on the barn; so you discussed those three things at the same time? A. Yes sir.

Q. Now what about the amount of insurance on the stone house, did you discuss that?

A. Four thousand dollars.

Q. Did you tell Mr. Hassett that was what you wanted on the stone house? A. Yes sir.

Q. What did Mr. Hassett say?

A. Said he would insure it; he would take care of it.

Q. Now you said that you had had other dealings in connection with fire insurance with Mr. Hassett prior to this date. A. Yes sir.

Q. How many other fire insurance policies had Mr. Hassett issued for you? [53]

A. He had insured the new house at the ranch in the spring.

Q. Now, Mr. Questa, I show you a policy of insurance in the Milwaukee Mechanics' Insurance

(Testimony of Silvo Questa.)

Company, in amount of seven thousand dollars and dated April 16, 1941, and I ask you if that is the policy that you refer to when you say Mr. Hassett insured the new house on the property?

A. What policy is this for, the amount? This is the policy for the new house?

Q. Well, do you recognize the policy? You stated that you had received a policy on the new house from Mr. Hassett, is that the policy?

A. What do you mean, I received a policy when?

Q. Well, I don't know. I thought you had had other insurance transactions with Mr. Hassett and had received policies from him.

A. Yes, the new house policy.

Q. Is that the policy? A. Yes, it is.

Mr. Levit: We offer that in evidence and ask it be marked Defendant's A.

Witness: Just a moment. Let me look this over. It was issued in March, wasn't it?

Mr. Levit: It appears to be.

A. Yes, that is right.

The Court: Let the policy be marked Defendant's Exhibit A.

Q. What other fire insurance policies had you received from [54] Mr. Hassett prior to this time, prior to August 1, 1941?

A. I hadn't received any yet.

Q. You hadn't received any yet?

A. He had insured the new house but the policy hadn't come as I know of.



(Testimony of Silvo Questa.)

Q. You mean you hadn't received this policy for the new house prior to the fire?

A. Oh yes, prior to the fire.

Q. I am sorry, I mean prior to August 1st.

A. Before August 1st?

Q. Yes. A. No, we hadn't received it.

Q. When did you receive this policy, this Defendant's Exhibit "A"?

A. My wife received that policy that I know of.

Q. And your testimony now is that that was received after the conversation on August 1st, is that correct? A. Yes sir.

Q. So that there must then, if you speak of an agreement whereby Mr. Hassett would come to the ranch and decide on the amount of insurance that would be put on a building, etc., there must have been other policies which you had had that kind of a transaction before August 1st. What were they?

A. He was at the ranch to see the new house while it was being built.

Q. You are speaking of the policy we just introduced in evidence? [55]

A. Yes. The policy was first talked about six thousand and when he came to the ranch we raised the policy to seven thousand.

Q. But you didn't receive that prior to August 1st? A. Before August 1st, no.

Q. Now what other policies did you receive from Mr. Hassett, or what policies of insurance did you receive from Mr. Hassett prior to August 1st?



(Testimony of Silvo Questa.)

A. Didn't receive any policy before August 1st. He hadn't sent them.

Q. Didn't you testify that Mr. Hassett had handled a great deal of insurance business for you and it was your custom that you were to have a certain course of dealing and then as a result of that Mr. Hassett would issue the policy and that is why you spoke of the usual form when you had this conversation?

A. Yes, we had that conversation on August 1st.

Q. Which conversation?

A. Our agreement.

Q. But actually then your testimony now is that prior to August 1st there had been no other insurance policy actually issued by Mr. Hassett to you?

A. There was the policy for the station wagon, but I hadn't received that yet.

Q. The station wagon was only purchased on July 25th, wasn't it? A. That is right. [56]

Q. And Mr. Hassett had not received all the insurance on that from Brown Motors Company?

A. A couple of days after it was bought, next day.

Q. So that your conversation with Mr. Hassett took place three or four days after the purchase of the station wagon? A. On the street.

Q. That is correct. Now what other insurance transactions, outside of the insurance on the new house, which resulted in the issuance of Defendant's Exhibit "A", this policy, did you have *have* with

(Testimony of Silvo Questa.)

Mr. Hassett prior to August 1st and other than the automobile insurance?

A. I had the conversation with him about insurance and about the new house in the spring.

The Court: He wants to know what other policies of insurance you have beside the one in evidence.

A. The new house policy and the station wagon policy.

Q. Now as a matter of fact, Mr. Hassett was down to look over the property before the issuance of this policy, wasn't he? A. What policy?

Q. The issuance of this policy on the new house.

A. No, we had called up Mr. Hassett on the telephone, Mr. Yori and I called him up for the new house——

Mr. Boyle: Just a second. Was Mr. Yori an agent of this company? A. No.

Q. Where does Mr. Yori enter into the picture?

A. Well, I was over on Commercial Row getting some help while we were building this new house in the spring, some ranch hands, and we started talking about insurance and he said, "Are you going to carry insurance?" I said, "Yes", and he mentioned Frank Hassett. I said I knew him very well and we called up and insured the new house that was being built for \$6500 and when Mr. Hassett came down later——

Q. When? A. In the spring, March.

Q. Of 1941? A. Of 1941.

(Testimony of Silvo Questa.)

Q. Then he came down to your house shortly after this conversation with him, didn't he? I mean, he came down to the ranch to look at the house?

A. Yes, he came down to the ranch to look at the new house.

Q. Do you know, Mr. Questa, whether or not Mr. Hassett issued a written binder or cover note on this new house before the issuance of the policy?

A. No, I never did receive one.

Q. But you are familiar with the insurance practice, and with Mr. Hassett's practice of issuing cover notes, binders, when insurance is bound?

A. I never did receive a cover note.

Q. Isn't it a fact on this onion insurance that you spoke about you received a number of cover notes from Mr. Hassett?

A. I received a cover note for the onions. [58]

Q. So that you are familiar with the nature of the issuance of a cover note for binding insurance, are you not?

A. I know now but I didn't then. I never heard of a cover note before the first trial.

Q. You may not have heard of that form of note, but you knew when Mr. Hassett bound insurance for you and did not issue the policy for some time afterwards, that it was his custom to issue a cover note or written memorandum of the insurance?

A. I don't know because I never did receive a cover note, only on those onions.

Q. You knew also, did you not, that Mr. Hassett,

(Testimony of Silvo Questa.)

and insurance agents generally, do not insure property unless they take a look at it first?

Mr. Boyle: Objected to as calling for conclusion of the witness. This man does not know what another man would do.

The Court: I think it is entirely beyond the limits of cross-examination, but I will overrule it. You may answer.

(Question read)

A. He told me any time I wanted any insurance he would take care of it and if it was too much, we would fix it, or if it was too little, we would fix it.

Q. Now, in order to refresh your recollection, Mr. Questa, I am going to ask you if you do not recall making the following answer in response to this question in your testimony at the first trial of this action, referring to page 70 of the printed [59] transcript: "Didn't you say just a moment ago the reason you wanted him to come down and see the barn was that you wanted more insurance than that and you thought if he saw it you could get more insurance?" and your answer: "Well, as far as I know, they all take a look at buildings before they insure and what I know about insurance is if you don't carry enough, the insurance company won't stand for that and if you insure for too much, why it is just too bad." Do you recall so testifying?

A. Yes.

Q. Isn't it a fact that it is quite within your knowledge, and was at the time you had the first

(Testimony of Silvo Questa.)

conversation with Mr. Hassett concerning this insurance, that before Mr. Hassett would bind the insurance or would write the policy, he would come down and look at the property?

A. No, when I put in an order, it was covered.

Q. Isn't it a fact, Mr. Questa, that Mr. Hassett specifically asked you, on the occasion of your first conversation with him, whether you wished him to hold the property covered pending the time that he could come down to the ranch and you replied that you did not wish him to do so?

A. I don't remember that.

Q. But you don't deny it, do you?

A. Yes, I do.

Q. You are quite sure that no such conversation occurred?

A. I am quite sure.

Q. Now how do you fix the date of this first conversation with Mr. Hassett?

A. Because it was right along when I bought the station wagon; it was right a few days after that I met him on the street.

Q. Now do you recall that when you testified at the first trial that you said, and I am referring to page 62 of the transcript: "Q. Are you sure that your first conversation with Mr. Hassett about insurance on the barn took place after you purchased the station wagon?" and your answer was: "I can't remember." Do you recall so testifying?

A. No, I do not.

Mr. Levit: Will counsel stipulate that that was his testimony?



(Testimony of Silvo Questa.)

Mr. Boyle: No. Just a second, let me read it. You first said, "You are sure that your first conversation with Mr. Hassett concerning the insurance on the barn, was after you purchased the station wagon?" The answer was, "I had talked to Mr. Hassett before that." "Q. About insurance on the barn?" "A. No, not about insurance on the barn." I presume that is what you are trying to read now? That is page 62.

Mr. Levit: Then read the following question and answer, that is what I read.

Mr. Boyle: (Reads) "Then I will repeat my question—are you sure that your first conversation with Mr. Hassett about insurance on the barn took place after you purchased the station wagon?" "A. I can't remember." "Q. Do you recall in this examination that we had in Mr. Boyle's office in January [61] of 1942 that you told me your first conversation with Mr. Hassett, with regard to insurance on the barn, was a few days before you purchased the station wagon?" "A. I purchased the station wagon on the 25th of July." "Q. Do you recall stating to me in Mr. Boyle's office that you had your first conversation with Mr. Hassett about insurance on the barn before you purchased the station wagon, three or four days before, to be exact?" "A. It is so far back it is almost a year; I am not sure about that."

Mr. Levit: Will you stipulate he so testified at the first trial?

(Testimony of Silvo Questa.)

Mr. Boyle: I will stipulate as to what is in there.

Mr. Levit: As to what you just read?

Mr. Boyle: Certainly. It is in the record.

Q. Now, Mr. Questa, Mr. Boyle has referred to certain testimony regarding a statement in there that you made at his office. Do you recall the making of that statement in January of 1942?

A. Yes sir.

Q. Now isn't it a fact, Mr. Questa, that at that time, in January of 1942, and under oath, you stated at that time that this first conversation took place a few days before you purchased the car?

A. I wouldn't remember.

Q. Well, as a matter of fact, do you remember whether this first conversation with Mr. Hassett took place before or after you purchased the car?

A. About the barn—it was after I purchased the station wagon.

Q. You are quite sure of that, are you?

A. Yes sir.

Q. And you think your memory is better now than it was in January of 1942, just three or four months after the fire?

A. I don't think it is any better, but I think it is just as good.

Q. Now counsel, reading from page 65 of the record of the transcript, I am going to read to you, Mr. Questa, some questions and answers quoted from the examination under oath, taken in Mr. Boyle's office in January of 1942. Now before doing so, however, if the Court please, I wish to introduce



(Testimony of Silvo Questa.)

in evidence the non-waiver agreement that was Defendant's Exhibit 3 at the last trial. Calling your attention, Mr. Questa, to this paper headed "Non-Waiver Agreement", I will ask you if that is your signature and if you did execute it in the office of the attorney, Mr. Boyle, at the date it bears?

A. That is my signature.

Mr. Levit: We offer it in evidence and ask it be marked.

The Court: Any objection?

Mr. Boyle: No objection.

The Court: Defendant's Exhibit B.

## DEFENDANTS' EXHIBIT B

### NON-WAIVER AGREEMENT

This Agreement entered into at Reno, Nevada, on this 26th day of January, 1942, by and between Silvo Questa and Jennie Questa (first parties) and Milwaukee Mechanics' Insurance Company (second party),

Witnesseth:

Whereas, first parties have served upon second party a document entitled Amended Proof of Loss, making claim on second party for loss by fire to a certain barn under an alleged agreement to insure the same, said fire being stated therein to have occurred on or about midnight September 21, 1941; and

Whereas, second party has not and does not admit

(Testimony of Silvo Questa.)

the issuance of any insurance upon said barn or the making or entering into by it or on its behalf of any agreement to insure the same or to issue a policy of insurance upon the same; and

Whereas, it is to the mutual advantage of all parties hereto to permit second party to investigate all the facts and circumstances concerning the alleged agreement to insure, the alleged fire and claim, and to ascertain the value of the said barn and the loss and damage, if any, thereto, without delay;

Now Therefore It Is Hereby Agreed by and between the parties hereto as follows:

1. Second party shall be free (but not obligated) to investigate and make any inquiry it may see fit, and to take such steps as it may be advised, with respect to any of the matters aforesaid.

2. First parties agree to furnish to second party all information within their ability to furnish and to submit to examination under oath, with respect to the foregoing matters.

3. Anything done or to be done in connection with any of the matters aforesaid shall not constitute an admission of the existence of any agreement to insure the said property or of the existence of any insurance upon the said property, or of any liability whatever on the part of second party for the alleged loss or damage to said property; nor shall second party thereby be deemed or held to have waived, invalidated, forfeited or modified any legal rights available to it should it be ultimately determined

(Testimony of Silvo Questa.)

that insurance of said barn by second party in fact exists.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

(Signed) SILVO QUESTA

(Signed) JENNIE QUESTA,

First Parties.

MILWAUKEE MECHANICS'

INSURANCE COMPANY

(Signed) By BERT W. LEVIT,

Second Party.

[Endorsed]: Filed Dec. 4, 1944.

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Q. Now quoting from the transcript of that sworn examination in Mr. Boyle's office: "'Q. Mr. Questa, when did you first discuss insurance on this barn with Mr. Hassett? A. When I first discussed it, it was along in the latter part of July.

Q. Of 1941? A. About the barn, yes.

Q. And where did that conversation take place?

A. It took place in town here on the street.

Q. You met Mr. Hassett on the street?

A. Yes.

Q. Now your insurance, or some of it, had been handled through—— A. Mark Yori.

Q. What is his name? A. Mark Yori.

Q. Had you ever discussed insurance on the barn with Mr. Yori? A. No.

(Testimony of Silvo Questa.)

Q. So that the first conversation you had about the insurance on this barn was with Mr. Hassett?

A. That is right.

Q. And it was in July of 1941? A. Yes.

Q. How do you fix that date, Mr. Questa?

A. Well, I fix the date by I had bought a station wagon on the 25th of July.

Q. And was it on the same day that you——

A. No, I had talked to him about the barn and I told him that barn cost \$15,000.00 to build.

Q. Before you get that far, I am just trying to fix the date of this conversation. It was how long after you purchased the automobile on July 25th?

A. I had talked to him about the barn before that.

Q. Oh, you talked to him before that?

A. Yes.

Q. How long before that?

A. I couldn't be safe on the dates; a little while before.

Q. Would you say it was as much as a month before? A. Oh no.

Q. About a week before?

A. A few days, yes.

Q. A few days before July 25th?

A. That is right.' ''

And then I will continue reading from the transcript of the first trial: "Now do you recall making that statement to me in Mr. Boyle's office?"

A. Well, I guess that is the statement.

(Testimony of Silvo Questa.)

Q. It sounds right, doesn't it? A. Yes.

Q. Does that refresh your recollection as to whether or not this conversation, [64] this first conversation, that you had with Mr. Hassett took place in August or in July?

A. In July or the first part of August, as far as I can remember.

Q. But you know, do you not, that you purchased the station wagon on July 25th?

A. That is right.

Q. And you recall that you testified today on direct examination that your first conversation was with Mr. Hassett after you purchased the station wagon? A. That is right.

Q. And in January you said it was before you purchased the station wagon, is that right?

A. I guess that is right."

Now, do you recall so testifying?

A. No, I do not recall, but I guess it is right because it is there.

Mr. Levit: Will counsel stipulate that is correct?

Mr. Boyle: I will stipulate what you have read is taken from the record, yes.

The Court: We will take a brief recess at this time.

(Recess taken at 11:00 o'clock.)

11:15 A. M.

Mr. Questa resumed the witness stand on further cross-examination by Mr. Levit.

Q. Now, Mr. Questa, did you ask Mr. Hassett, on the first occasion that you spoke to him, which according to you was on August 1, 1941, to come down to the ranch and see the barn?

A. I asked Mr. Hassett on August 1st to insure my barn and to come down to the ranch and see the barn.

Q. You asked him to come down to the ranch and see the barn? A. Yes.

Q. As a matter of fact you knew that was a part of the practice of his writing insurance, didn't you, his issuing the policy? A. Yes.

Mr. Boyle: Objected to as conclusion of the witness.

Mr. Levit: He has already answered "yes", your Honor.

Mr. Boyle: I move that the answer be stricken until I have an opportunity to object.

The Court: All right, it may go out.

Mr. Boyle: My objection was as I stated.

The Court: I will allow the witness to answer the question, although I must confess I do not see what difference it makes whether the witness knew or he didn't know what the custom of the insurance company is. Let it stand though.

Q. Now your testimony now is that you asked Mr. Hassett to come down to the ranch and see the barn?



(Testimony of Silvo Questa.)

A. I asked Mr. Hassett to insure the barn for \$7500. for three years in the usual form, with the usual policy issued me on other property.

Q. Issued you on other property, but didn't you say just a moment ago that there were not any other policies issued to you on other properties that Mr. Hassett had for you?

A. He had the new house policy.

Q. You testified you hadn't gotten any policies prior to [66] August 1st.

A. He hadn't delivered it.

Q. So you didn't know then what the form was and you don't mean—I will withdraw that. As a matter of fact, most of your insurance transactions with Mr. Hassett took place after this conversation of August 1st, didn't they?

A. And August 1st.

Q. And at August 1st? A. Yes.

Q. The only transaction of insurance, as I understand it, you had with Mr. Hassett was insurance on the new house, which culminated later in Defendant's Exhibit "A", and the insurance on the station wagon, is that correct? A. Yes.

Q. And the station wagon may or may not have occurred before the date of this conversation?

A. The station wagon occurred before the date of the barn.

Q. That is your testimony now? A. Yes.

Q. Does Mr. Hassett still handle your insurance?

A. Yes, he handles some of my insurance.

(Testimony of Silvo Questa.)

Q. Didn't you say a moment ago on direct examination that Mr. Hassett is your insurance agent and insures everything that you have?

A. Yes, he insures everything I desire to have insured.

Q. And that is a fact at the present time, is it?

A. Yes, he has some of my insurance.

Q. And it has been a fact ever since the time we are talking about in 1941?

A. Yes.

Q. Do I understand you to say now that you carry insurance with other general agents besides Mr. Hassett?

A. Mr. Hassett carries around 80 or 85 per cent of my insurance.

Q. Of course you know that Mr. Hassett no longer represents the Milwaukee Mechanics', don't you.

A. Yes, very well.

Q. Now, in order to refresh your recollection as to whether or not you asked Mr. Hassett to come down and look at the barn, calling your attention to page 69 of the transcript: "Q. What else was said at the conversation about this insurance? I am not speaking about the automobile insurance now. A. And he said he would come down to the ranch to look — 'I will come down and look.' " (being quoted) "Q. Did you ask him to come down? A. No, he said he would come down." Do you recall so testifying?

A. No, I do not recall so testifying, but if this is what I testified—

Mr. Levit: Will counsel stipulate?

Mr. Boyle: I didn't get the exact line.

(Testimony of Silvo Questa.)

Mr. Levit: The last three or four lines on Page 69.

Mr. Boyle: (Reads) "And he said he would come down to [68] the ranch to look—'I will come down and look.'" "And you asked him to come down." Is that what you have reference to? "And he said he would come down."

Mr. Levit: "Q. Did you ask him to come down?"

A. No, he said he would come down."

Mr. Boyle: Yes, that is there.

Mr. Levit: Is that stipulated?

Mr. Boyle: I will stipulate.

Q. Now referring to the fact of insurance on the stone house, that is, the old house as compared to this new house we have been talking about, is that correct? A. Yes.

Q. I believe you testified a few moments ago, would it be correct to say, that that is the old house and this other house that was insured under policy, Defendant's Exhibit "A", was the new house?

A. Yes.

Q. Now you said that at this first conversation, in addition to mentioning insurance on the barn, insurance on the automobile, you also requested insurance of four thousand dollars on the stone house?

A. Yes.

Q. That is correct? A. Yes.

Q. Now you recall, of course, the sworn examination in Mr. Boyle's office in January of 1942, do you not? [69] A. Yes.

Q. You recall on that occasion that you were

(Testimony of Silvo Questa.)

asked to relate all of the conversation you had with Mr. Hassett on August 1st?

The Court: Read the questions if you have them.

Mr. Levit: I will withdraw that.

Q. Is it not a fact that although you related, or purported to relate, the conversaaion with Mr. Hassett on August 1st, that you made no mention of making any statement or having any discussion to or with Mr. Hassett concerning any insurance on the stone house?

A. If I did—but he was supposed to insure the stone house at the same time.

Q. But it was a fact that you did not?

Mr. Boyle: Objected to the instrument itself is the best evidence.

Mr. Levit: I am entitled to question the witness about his recollection.

Q. As a matter of fact, I will call your attention to page 73 of the transcript and ask you if you recall testifying as follows: “Q. You didn’t say anything to me in that conversation as you related it \* \* \* \*” (referring to the sworn examination of January, 1942) “\* \* \* \* you didn’t say anything to me in that conversation as you related it about any insurance on the house, did you?” “A. I guess I didn’t. Q. How do you account for that, Mr. Questa? A. Well, it was just a lucky thing, I guess, that the house didn’t burn down, or I would have the [70] same trouble. Q. I say how do you account for the fact when you related the conversation to me before in January, you did not state any-

(Testimony of Silvo Questa.)

thing about any conversation concerning the house and insurance on the house? A. No. Q. Can you account for that? A. Well, it was taken care of then. He had his policies then and the stone house hadn't a policy, so why bring that up? Q. You didn't get the policy on the house, did you, until after the fire? A. That is right." Do you recall so testifying? A. Yes.

Q. And that is the fact, is it not, that you did not mention that in the conversation that you related when you related it in January, 1942, under oath?

A. How is that question?

Q. I say it is a fact, is it not, in January, 1942, when you purported to relate the entire conversation with Mr. Hassett, that you made no mention of having any conversation about insurance on the stone house? A. On August 1st?

Q. On August 1st. A. Yes.

Q. That is a fact, isn't it? A. Yes.

Mr. Boyle: Your answer is that you did not mention the stone house, is that it?

A. That I did mention the stone house. [71]

The Court: Of course you complicated it, counsel, by asking him something from memory that you already asked him from the record.

Mr. Levit: It is a difficult thing, your Honor, to prove a negative statement, that is the reason I thought I had to get at it in a sort of round-about way.

Q. Now did you tell Mr. Hassett on August 1, 1941, assuming that was when this conversation oc-



(Testimony of Silvo Questa.)

curred, that the reproduction cost of the barn was so much, or the value was so much? Did you have any discussion with him about the values or reproduction cost?       A. Yes.

Q. Now in relating the conversation on direct examination, of August 1st, I do not believe you made any mention of that. I may be wrong, but will you tell us please what the conversation was now that you had concerning values and reproduction cost?

Mr. Boyle: Are you referring to the record?

The Court: If counsel is referring to direct examination, my recollection is that the witness was not questioned about conversation with respect to value, but merely gave his conversation.

Mr. Levit: May I respectfully suggest the witness was asked to give the conversation he had with Mr. Hasset on reproduction cost or value of the barn.

The Court: The record speaks for itself.

Q. What is the fact with regard as to whether or not you did [72] on August 1st have any conversation with Mr. Hassett concerning values or reproduction cost of the barn?

A. I asked him to insure the barn for \$7500.

Q. Was any other amount mentioned?

Mr. Boyle: If that is an impeaching question, your Honor—

The Court: There is nothing before the Court.

Mr. Boyle: I know. If it is intended to be, the proper method would be to show him the record and



(Testimony of Silvo Questa.)

ask him if he testified at a certain date accordingly and read the record.

The Court: Counsel is just asking now if he had any discussion as to any other amount.

Mr. Levit: That is right.

A. Yes, we talked about it.

Q. About what? A. Values.

Q. What did you say about values?

A. I said the barn is worth \$15,000. I want it insured for \$7500.

Q. Now on direct examination, when you related the conversation you made no mention of that and are you quite sure now that what you told Mr. Hassett on that occasion was that the barn was worth \$15,000? A. That is right.

Q. And isn't it a fact that the actual conversation that you had with Mr. Hassett at that time was not with relation to the value of the barn, but with relation to the reproduction cost of [73] the barn?

A. No, not reproduction cost.

Q. That is not correct? You never mentioned reproduction cost? A. Not that I know of.

Q. Referring to page 35 of the transcript—

A. (Interrupting): I believe I said it would cost \$15,000 to build that barn.

Q. You believe you said that to Mr. Hassett on August 1st? A. I am quite sure.

Q. That would be contradictory to the statement that you told Mr. Hassett—

Mr. Boyle: We object, your Honor, on the grounds such statement is argumentive and also conclusion on the part of counsel.

(Testimony of Silvo Questa.)

The Court: Counsel hadn't finished the question.

Mr. Levit: I will withdraw the question and rephrase it.

Q. A moment ago, Mr. Questa, you said on August 1st you told Mr. Hassett that the barn was worth \$15,000 and then a few moments later you said its reproduction cost was \$15,000. Now which is correct, which do you say?

A. I said the barn was worth \$15,000; it was worth \$15,000.

Q. You said it was worth \$15,000?

A. Yes.

Q. Did you mention reproduction cost?

A. No.

Q. You did not. Now calling your attention to page 85 of the [74] transcript, I will ask you if you recall giving the following answers to the following questions: "Q. Now did you ever mention to Mr. Hassett the reproduction cost of the barn prior to the fire? A. Before the fire? Q. Yes. A. Yes. Q. When? A. What was that question? Q. Before the fire? A. No. Q. You are quite sure of that, are you? A. Sure. Q. Now calling your attention again to the statement that you gave me in Mr. Boyle's office: 'Now what was your conversation with him at that time?' This refers to the first conversation. 'A. I told him I wanted to insure that barn. You know he has insurance on the new house and I told him I wanted insurance on that barn and he asked me what I thought of the barn. I said, 'Oh, the barn is a huge thing, it

(Testimony of Silvo Questa.)

cost \$15,000.00 or more to build it today.' '' Do you recall so testifying?           A. Yes           .

Q. So it is a fact, is it not, Mr. Questa, that on the original examination taken in January, 1942, you testified that you told Mr. *Questa* that the reproduction cost of the barn was \$15,000 on August 1st?

Mr. Boyle: Your Honor, we must interpose an objection at this time to the manner of interrogating this witness, for the reason that the words used by Mr. Levit. are confusing. While we will admit that when it is said "to build it today" and "to reproduce it" would have the same meaning, the words would be synonomous, but nevertheless we would prefer that the words of the record be used in asking the question of Mr. Questa to ask [75] him if he mentioned anything about the barn being built today, what it would cost, rather than reproduction value because it has a tendency to confuse.

Mr. Levit: I have no desire to confuse the witness I will try this other language.

Q. You replied, did you not, Mr. Questa, in January, 1942, in the sworn examination, you stated you told Mr. Hassett on August 1st that it would cost \$15,000 to build the barn today. Do you recall that?

A. Yes.

Q. Now you also recall, from what I read a moment ago, do you not, that at the first trial of this action you testified that you were quite sure that you did not ever before the fire mention to Mr. Hassett the reproduction cost of the barn. That is correct, isn't it?

(Testimony of Silvo Questa.)

A. Reproduction and to rebuild is the same thing. The barn is worth \$15,000. I believe it is worth \$15,000. I do not know—to build it new, that is the same thing to me.

Q. In other words, your idea of value is the same as the cost of reproduction new, is that correct?

A. Yes.

Mr. Levit: If the Court please, at this time we move to strike the witness's testimony given on direct examination as to value of the barn, on the ground the witness has demonstrated by his last answer that he does not have any proper conception of the meaning of the term "value" as related to the issues of [76] this action.

Mr. Boyle: May it please the Court——

The Court: I will deny the motion.

Q. Now you had two other conversations with Mr. Hassett, according to your testimony, Mr. Questa, concerning the policy of insurance after August 1st, that is correct, isn't it? A. Yes.

Q. Now it is a fact, is it not, Mr. Questa, that no amount of insurance was ever mentioned at either of these other conversations, either by you or Mr. Hassett? Isn't that correct?

A. After the first conversation?

Q. Yes sir. A. No.

Q. You mean no, no amount was ever mentioned, or no, that is not correct?

A. The amount was mentioned along the first of August.

Q. At the first conversation? A. Yes.

(Testimony of Silvo Questa.)

Q. And no amount of insurance was mentioned by either of you any time after that, prior to the fire, is that correct?

A. After that, no, not that I remember.

Q. That is correct then? A. Yes.

Q. Now the second conversation that you spoke of was when you said you met Mr. Hassett on Virginia Street about one p.m. in the middle of August. How do you fix that date, Mr. Questa? [77]

A. I fix the date along about the 15th that my wife had made him a check——

Mr. Levit: You have the check, Mr. Clerk?  
(Check produced.)

Q. Calling your attention to a check dated August 15th and signed by Jennie Questa, 1941, on the First National Bank, payable to Frank Hassett, Inc., in the amount of \$75.00, I will ask you if that is the check you are referring to? A. Yes.

Q. That is the check that fixed the date of the second conversation you had with Mr. Hassett?

A. Yes.

Mr. Levit: We will offer the check in evidence and have it marked Defendant's Exhibit next in order.

The Court: Defendant's "C."

(Testimony of Silvo Questa.)

DEFENDANT'S EXHIBIT C

Sparks, Nevada, Aug. 15, 1941

Pay to the Order of Frank Hassett, Inc., \$75.00  
(Seventy-five and no/100) Dollars.

[94-61] Sparks Branch [94-61]

First National Bank

In Reno

Sparks, Nevada

JENNIE QUESTA

[Stamped on reverse side of check]:

94-2 First & Vine Branch 94-2

Pay to the Order of First National Bank of  
Nevada.

Frank Hassett, Inc.

Pay to the Order of Any Bank, Banker or Trust  
Company or Through Reno Clearing House All  
Prior Endorsements Guaranteed.

Aug. 16, '41. 0004

First National Bank of Nevada

First & Virginia Branch

94-2 Reno, Nevada 94-2

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Q. Now did Mr. Hassett come to the ranch before  
or after that check was made out?

A. He came to the ranch after that check was  
made out.

Q. I will call your attention to the examination  
under oath again as quoted on page 78 of the record.



(Testimony of Silvo Questa.)

Do you recall this testimony, relating to the bookkeeper of Mr. Hassett's who came to the ranch on the day this check was made out and to whom it was given. You recall that, do you not: " \* \* \* so he came down.

Q. Came to your ranch?

A. To the ranch and I had just left for town.

Q. When was that?

A. That was before the 15th of August.''' I am sorry—I will have to withdraw that question—the reference was not to the bookkeeper. It was to Mr. [78] Hassett. Referring to Mr. Hassett: " \* \* \* so he came down.

Q. Came to your ranch?

A. To the ranch and I had just left for town.

Q. When was that?

A. That was before the 15th of August'.' Do you recall so stating? A. No, I do not.

Mr. Levit: Will counsel stipulate that was the testimony given in January?

Mr. Boyle: I will stipulate that was in the record.

Mr. Levit: I am afraid I can't accept the stipulation in that form. I want a stipulation that was the testimony as given by Mr. Questa in January of 1942 in the sworn examination.

The Court: The record so shows, does it not?

Mr. Levit: Not necessarily so, your Honor. He followed that up by stating he did not remember so stating.

The Court: I am confused now because the wit-

(Testimony of Silvo Questa.)

ness has said it was after the check he had the conversation.

Mr. Levit: That is right.

The Court: What you are reading is the visit of Mr. Hassett to the ranch before the check was given, but by a later question the witness wasn't there, he had left.

Mr. Levit: I believe your Honor is quite correct and I would like at this point to clear it up and ask counsel to stipulate to that portion as being correct statement of the transcript of sworn examination.

The Court: There is no question about it? [79]

Mr. Boyle: No, I don't see any reason why it should be wrong.

Q. Did Mr. Hassett's visit to the ranch take place before or after Mr. Hassett's bookkeeper had been to the ranch on August 15th? A. After.

Q. The fact is that counsel has just stipulated you stated in that sworn examination that Mr. Hassett came to the ranch before August 15th. Can you explain that discrepancy?

A. To my remembrance he came after August 15th because I told his bookkeeper, I asked him where Frank was and he said he was at his office and I told his bookkeeper to tell Frank to come to the ranch, I wanted to see him.

Q. Your recollection now is that it was after the 15th of August that he came to the ranch?

A. Yes.

Q. Now was your second conversation with Mr.

(Testimony of Silvo Questa.)

Hassett about the middle of August before or after Mr. Hassett had been to the ranch?

A. It was before. The conversation on the street was before he came to the ranch.

Q. I am speaking of the second conversation you said took place about the middle of August.

A. Yes, the second conversation.

Q. It was before he had come to the ranch?

A. When I had the conversation with him in Reno it was before [80] he had come to the ranch.

Q. That was when you met him on Virginia Street at one p.m. the middle of August?

A. That is correct.

Mr. Boyle: That follows up what he wanted me to stipulate was correct. If you will read the rest of the testimony, I do——

Mr. Levit: May it please the Court, I have no objection to counsel reading any portion of the record.

Mr. Boyle: If you are going to read it, read all of it.

Mr. Levit: I am reading portions that seem relevant.

Mr. Boyle: We just want you to read the part you are interrogating him on.

Mr. Levit: That is what I am doing.

Mr. Boyle: You didn't do it that time.

Q. Isn't it a fact, Mr. Questa, that you testified as follows on the first trial of this action:

“Q. Oh, you asked him (meaning Mr. Hassett) to deliver your policy? A. Yes.

(Testimony of Silvo Questa.)

Q. And you did not say anything to him then about not coming out to the ranch?

A. No, he was to the ranch.

Q. And you were satisfied with that and you didn't expect him to come out again then?

A. No.

Q. Now, as a matter of fact, Mr. Hassett's visit to the ranch took place in your absence and before his bookkeeper came out to collect that check that you put in evidence?" etc. Now calling your attention specifically to the testimony you gave at the first trial that he was already out to the ranch when you had the second conversation, do you recall so testifying? [81]

A. I don't know, but it was after the 15th, after the second conversation.

Mr. Boyle: Mr. Levit, will you give me the page you are reading from?

Mr. Levit: That is page 77.

Q. Now also on page 82, isn't it a fact that you testified as follows:

"Q. When you saw Mr. Hassett in town before the fire and after he had been to the ranch, did you have any discussion with him as to the amount of insurance on the barn?

A. I asked Mr. Hassett about delivering my policy about the middle of August and I am quite sure that he had been at the ranch then, in between the 15th, 16, or 17th that I met Mr. Hassett——"  
And continuing:

(Testimony of Silvo Questa.)

“Q. I will withdraw the question. You told us this morning that you talked to Mr. Hassett in the middle of August and the last of August. Now I asked you which of those conversations took place after he had been at the ranch and you said that only the last one, you only talked to him once after he had been to the ranch, is that right?

A. No, I think I had a conversation on the street with him.

Q. After he had been to the ranch?

A. I don't remember.” Do you recall so testifying?

A. No, I do not.

Mr. Levit: Will counsel stipulate?

Mr. Boyle: I will stipulate that this is in the testimony, yes. I won't stipulate he does not remember.

Mr. Levit: That is what I mean, stipulate that this is his [82] testimony at the first trial.

Q. Now had Mr. Hassett come to the ranch prior to the third conversation which you said took place the last of August or early in September at the Riverside bar?

A. He came to the ranch after the 15th of August and the conversation I had with him at the Riverside bar was the latter part of August or the first week in September.

Q. Had he already been to the ranch?

A. He had been to the ranch.

Q. Were you expecting him to make another visit to the ranch at that time or did you feel, as

(Testimony of Silvo Questa.)

far as you knew, he had completed his examination of the property?

A. He had completed his examination of the property.

Q. Now isn't it a fact that Mr. Hassett said to you, when you asked him about the insurance, "I will take care of it; I will come down," meaning come down to the ranch?

A. That is what he said there at the Riverside as I walked by him.

Q. Now did you understand his statement that he would come down to the ranch if he had already been there and there was no occasion to visit the ranch?

A. He could come down any time, he could come down to visit. He had already been to the ranch.

Q. But the fact is there was no point, so far as you were concerned, to another visit to the ranch?

A. That is right. [83]

Q. Now, Mr. Questa, it is a fact, is it not, that at the time of the fire this barn was in excess of fifty years' old?

A. I wouldn't say that.

Q. Well, how old would you say it was?

A. Oh, I should judge the barn was around thirty-five years old.

Q. On what do you base your statement as to the age of the barn?

A. Well, just by hearsay that it had been there so long, that it was a landmark in this valley.

Q. You knew from hearsay also, did you not, that it was not built new at the time of construc-



(Testimony of Silvo Questa.)

tion? It was built of old timbers from Virginia City?

A. I heard the timbers came from Virginia City, just the timbers.

Q. It is a fact, is it not, that this property with the barn on it was owned by Mrs. Questa's family before you acquired it?

A. Her father and mother, yes.

Q. And do you know when they acquired it?

A. No, I do not.

Q. Do you know whether the barn was on it at the time they acquired it? A. No, I do not.

Q. Now you stated that you had taken the floor out of the barn, and the floor joists, too, is that correct?

A. No, just the floor, so I could put piers underneath, cement [84] piers, underneath these timbers.

Q. And you didn't take out the floor joists?

A. What do you mean by floor joists?

Q. I mean the timbers on which the floor is supported. A. Yes, I took all the floor.

Q. And you took all the floor joists out, too, didn't you? A. Yes.

Q. Now when did you do that?

A. Along in '38 or '39.

Q. So that from 1938 or 1939, whenever it was, there was no floor in the barn at all, was there?

A. No.

Q. And you say you put in these stone pillars—

A. Cement.

(Testimony of Silvo Questa.)

Q. —on which to build supports for the wall, etc?      A. For the timbers, foundation.

Q. Let me ask you, how much did you spend on the barn for putting in those concrete pillars?

A. As I recall it, about \$500.

Q. Five hundred dollars?

A. Yes, I think so.

Q. What other work did you do on the barn since you took it over? When did you take it over, by the way?      A. 1932.

Q. Now what work did you do on the barn from the time that you took it over? [85]

A. That work there.

Q. You mean putting in concrete pillars?

A. Yes.

Q. And what else?

A. And had it all straightened out and fixed some doors and windows, had it painted.

Q. Just a minute. Now the doors and windows you had all straightened out, you say?

A. The frames.

Q. Had they warped?

A. No, they hadn't warped but on some of them posts they started to sink so I just leveled it all up and put cement under all of them.

Q. And how much did you spend on fixing the windows and doors?

A. I don't remember; \$500 for the whole thing.

Q. That included the concrete pillars and windows and doors?      A. That is right.

Q. What other work did you do on the barn? I think you said something about painting it.

(Testimony of Silvo Questa.)

A. I painted it years before that.

Q. How long before the fire?

A. Oh, I think it was around eight years before the fire.

Q. It might have been a little longer than that?

A. Well, eight or nine, I don't remember right to the year. Could have been ten.

Q. How much did you spend in painting that?

A. I don't recall now.

Q. You had it done by some outfit that was just passing through at the time, didn't you?

A. Yes.

Q. The roof of this barn had never been reshingled, had it?

A. The roof was in good shape except one little corner.

The Court: No, the question was had it ever been reshingled?

A. No, I didn't have to reshingle it, no.

Q. Now in addition to tearing out the floor and the floor joists two or three years before the fire and not replacing them, you had also taken out all of the stalls that were in the barn, hadn't you?

A. Yes.

Q. And you never replaced any of those?

A. No, sir.

Q. And in addition to that, there was a sort of second story in the barn, wasn't there?

A. There was a big second story.

Q. And you used that for storing onions, didn't you?

A. That is right.

(Testimony of Silvo Questa.)

Q. And in order to get air to the onions, you had pulled up some of the boards in the floor, hadn't you, of the second story? A. That is right.

Q. And you tore out those boards?

A. For air circulation.

Q. You had never replaced them prior to the fire?

A. We replaced them. When we put the onions back, then we took them out.

Q. The fact is that you pulled the boards out of the hay loft floor to get air to the onions?

A. Yes, but the boards were up there all the time.

Q. They weren't there at the time of the fire, they weren't in place?

A. They were not in place, no.

Q. You mean you had the boards put away?

A. That is right.

Mr. Levit: I think that is all, your Honor.

#### Redirect Examination

By Mr. Boyle:

Q. I show you a certain instrument and ask you if you are familiar with the signature on there? Is that your handwriting? Did you sign it?

A. Yes.

Q. And this also—they are both together?

A. Yes.

Q. This is termed "Proof of Loss?"

A. Yes.

Mr. Boyle: Your Honor, I would like to offer this in evidence.

(Testimony of Silvo Questa.)

Mr. Levit: No objection. [88]

The Court: Plaintiffs' Exhibit 3.

### PLAINTIFFS' EXHIBIT No. 3

#### PROOF OF LOSS

State of Nevada,

County of Washoe—ss.

Silvo Questa, being first sworn says: That Silvo Questa and Jennie Questa were the owners of a large barn situated on the Glendale Ranch in Washoe County, Nevada; That during the first part of August, 1941, Frank Hassett as agent for the Milwaukee Mechanic's Insurance Company entered into an agreement for and in consideration of the premiums to be paid for insuring an automobile and a home and a large barn on the said Glendale Ranch; That it was agreed that the barn was to be insured for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); That Frank Hassett as agent for The Milwaukee Mechanic's Insurance Company was to deliver a policy to Silvo Questa and Jennie Questa and the said Frank Hassett was to collect the insurance premiums; That Frank Hassett did not deliver the said insurance policy as agreed upon and the barn burned down on or about September 20, 1941 and was completely destroyed; That Silvo Questa has heretofore notified the said insurance company of the loss of fire of the barn aforesaid. That this affidavit is in the form of a written notice and proof of loss by fire

(Testimony of Silvo Questa.)

of a barn insured by the Milwaukee Mechanic's Insurance Company, situated on the Glendale Ranch the property of Silvo and Jennie Questa; That the said barn is a total loss.

Dated: January 8, 1942.

SILVO QUESTA

Subscribed and sworn to before me this 8th day of January, 1942.

[Seal]

WILLIAM S. BOYLE

Notary Public, Washoe  
County, Nevada

### AMENDED PROOF OF LOSS

State of Nevada,

County of Washoe—ss.

Silvo Questa, being first sworn says: That Silvo Questa and Jennie Questa were the owners of a large barn situated on the Glendale Ranch in Washoe County, Nevada; That during the first part of August, 1941 Frank Hassett as agent for the Milwaukee Mechanic's Insurance Company entered into an agreement for and in consideration of the premiums to be paid for insuring an automobile and a home and a large barn on the said Glendale Ranch; That it was agreed that the barn was to be insured for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); That Frank Hassett as agent for The Milwaukee Mechanic's Insurance Company was to deliver a policy to Silvo Questa and Jennie Questa and the said Frank Hassett was



(Testimony of Silvo Questa.)

to collect the insurance premiums; That Frank Hassett did not deliver the said insurance policy as agreed upon and the barn burned down on or about midnight September 21st, 1941 at 12:10 A.M. and was completely destroyed; that there was an incumbrance of Sixteen Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$16,666.66) on the ranch; that there was no other insurance thereon; that the origin of the fire is unknown; That Silvo Questa has heretofore notified the said insurance company of the loss of fire of the barn aforesaid, namely on September 26, 1941 and again demanded the policy of insurance. That this affidavit is in the form of a written notice and proof of loss by fire of a barn insured by the Milwaukee Mechanic's Insurance Company, situated on the Glendale Ranch the property of Silvo and Jennie Questa; That the said barn is a total loss; That no insurance policy was delivered to the insured to this date; that there was no change in the title, use, occupation or exposure of the barn since, 1940.

Dated Jan. 19, 1942.

SILVO QUESTA

Subscribed and sworn to before me this 19th day of January, 1942.

[Seal]

WILLIAM S. BOYLE

Notary Public, Washoe  
County, Nevada

[Endorsed]: Filed Dec. 4, 1944.

(Testimony of Silvo Questa.)

Mr. Boyle: And I also desire to put in evidence a letter which was received—I will have Mr. Levit take a look at that. You remember receiving that, do you not?

Mr. Levit: Well, no, I never received it. I have no objection. It was in at the first trial. It wasn't addressed to me, your Honor.

Mr. Boyle: It was put in by you.

Mr. Levit: I have no objection to it going in.

The Court: Plaintiffs' Exhibit 4.

PLAINTIFFS' EXHIBIT No. 4

William S. Boyle

Attorney at Law

202-3-4 Gazette Building

Reno, Nevada

Phone 5592

January 8th, 1942

Frank Hassett, Esq.

Agent

The Milwaukee Mechanic's Insurance Co.

Reno, Nevada

Dear Mr. Hassett:

I am enclosing a proof of loss in affidavit form for a large barn situated on the Glendale Ranch, Washoe County, Nevada, the property of Silvo and Jennie Questa which was destroyed by fire on or about September 20, 1941.

Very truly yours,

W. S. BOYLE

William S. Boyle

WSB:jm

[Endorsed]: Filed Dec. 4, 1944.

(Testimony of Silvo Questa.)

Mr. Levit: While counsel is looking at his notes, I have two other questions I would like to ask.

The Court: All right.

By Mr. Levit:

Q. I believe you testified you had no discussion as to values at all or amounts of insurance on either the second or third conversation with Mr. Hassett, is that correct? A. Yes.

Q. Although there is no doubt that at least one or possibly two, both, of those conversations had taken place after Mr. Hassett had been out to the ranch, is that correct? A. One.

Q. At least one of them took place after Mr. Hassett went to the ranch, is that right?

A. Yes.

Q. I believe you testified it was the custom, in regard to [89] your dealings with Mr. Hassett, that Mr. Hassett would go out to the ranch or out to the property and inspect it, in order to determine what amount of insurance he would be willing to put on it, and thereafter you and he would discuss the matter and arrive at some satisfactory figure for the final policy, do you recall so testifying?

A. Yes.

Q. Then how do you explain the fact that on this conversation you had with Mr. Hassett after he had been to the ranch, there was no conversation with you with reference to the amount of insurance to be carried?

A. I saw Mr. Hassett once after he had been to the ranch and there was no discussion about values of a policy. I met him at the Riverside bar.

(Testimony of Silvo Questa.)

Q. But you did discuss the insurance?

A. I asked him about the policy and he said he would take care of it, the last time I saw him after he had been to the ranch.

Q. I asked you whether you could explain why there was no discussion of values, inasmuch as you testified your custom was, after Mr. Hassett had inspected the property, there would be in the ordinary course a discussion of the amount of insurance you would finally agree upon.

A. Yes, if it was too little, we would raise it and if it was too much, we would lower it.

Q. But on this occasion you did not see any point to discussing it? [90]

A. He agreed to insure it for \$7500.

Q. Now one more question. How much, in your opinion, would a barn of the type of the barn that is the subject of this action, depreciate in a year?

A. I don't know anything about depreciation. The barn was in excellent condition and we kept it up and were going to fix it up——

The Court: The question was what you say a barn like this would depreciate? What percentage, is that what you mean?

Mr. Levit: Yes, your Honor.

A. It would depreciate——

Mr. Boyle: I interpose an objection at this time, your Honor, on the ground the question is unintelligible, for the reason a barn is like a building or any other structure; it would depreciate depending

(Testimony of Silvo Questa.)

upon lack of care that the building has, so consequently there is no way of fixing.

The Court: Do you object to the question?

Mr. Boyle: Yes, your Honor, upon the ground stated.

The Court: It would not be very helpful to the Court what Mr. Questa said was the depreciation.

Mr. Levit: Except this—counsel has asked the question and there is in the record statement as to the value of the barn. Obviously it is proper cross-examination to ascertain the depreciation factor that the witness took into consideration, if any, in fixing his value, which is in the record. [91]

The Court: Ask him how he took that into consideration.

Q. Did you, Mr. Questa, have any idea whatever, or have you any idea whatever now, of the depreciation that a building of the type of this barn would incur in the course of a year?

A. No, I have not.

Mr. Levit: That is all.

(Recess taken at 12:00 o'clock until 1:30 P.M.)

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### Afternoon Session

December 4, 1944—1:30 P.M.

### MR. QUESTA

resumed the witness stand.

Mr. Boyle: If the Court will permit me, I would like to ask one or two questions on direct.

(Testimony of Silvo Questa.)

Q. Mr. Questa, what happened on the 20th day of September, 1941, with reference to the barn that we have been talking about all morning?

A. The barn burned down, was completely destroyed.

Q. Did the Milwaukee Mechanics' Insurance Company, through their agents or any one, deliver a policy of insurance to you?

A. No, sir.

Mr. Boyle: You may cross-examine.

Mr. Levit: No further questions. [92]

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JOHN FEURESTEIN,

a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boyle:

Q. What is your name, please?

A. John Feurestein.

Q. Where do you reside, Mr. Feurestein?

A. 132 Winter, Reno.

Q. How long have you lived in Nevada?

A. Nine years.

Q. What is your business or occupation?

A. Construction; general contractor.

Q. How long have you been in that business?

A. In Nevada for approximately six years.

Q. And where else?

A. In Nebraska previous to that.

Q. How long have you been in the business alto-



(Testimony of John Feurestein.)

gether, whether in Nevada or Nebraska or elsewhere?

A. I have followed construction game ever since I was a boy.

Q. Did you serve your apprenticeship as a carpenter? A. As a carpenter.

Q. And then you became a contractor?

A. No, I was superintending work before I became a contractor.

Q. During that time what particular building did you construct? A. In Nevada?

Q. Any place? [93]

A. Well, I was in charge of work out here at the Reno Air Base, in charge of five hangars constructed out there, and also general foreman for J. A. Haddock, and I just completed a large barn out here in the country.

Q. Prior to that time, while you were apprentice and also, I presume, journeyman, did you work on large buildings? A. Yes.

Q. Name some of them for the Court.

A. I was foreman on the Sharp Building in Lincoln, Nebraska, one million five hundred thousand dollars, and carpenter on the Cornhuskers Hotel, Lincoln, Nebraska, and also worked on the State Capitol Building.

Q. Did you, during that time, acquire a knowledge of the values of buildings?

A. Well, I have been figuring work for the past 15 years.

Q. And during that time, by figuring work, you

(Testimony of John Feurestein.)

could answer the question asked, as to whether you acquired a knowledge of the value of buildings.

A. You would have to be able to estimate the cost of the job.

Q. Did you or did you not ever see a barn on the Questa ranch on the Glendale Road, the picture of which I am showing you?

A. Yes, I have seen this barn.

Q. Did you have occasion to inspect it or look at it?

A. I had the pleasure of being in that barn one Sunday afternoon, although Mr. and Mrs. Questa were not present.

Q. Will you describe the nature of the building?

A. Well, I couldn't but help notice the type of construction it was.

The Court: No; tell us what kind of building it was.

A. Well, for the age of the barn, it is a pretty well constructed barn.

The Court: The answer may go out. The question is, describe it, what it was made of.

A. The barn was constructed of huge timbers, had timbers as large as 10x12 and 8x8 and 6x6 which I noticed in there.

Q. What was the condition of the building?

A. At the time I saw it, the building appeared to me as though it had been reconditioned.

Q. The evidence is that the barn was destroyed on the 20th of September. Now when did you see it prior to that time?

(Testimony of John Feurestein.)

A. Well, this was in August.

Q. That would be a month before?

A. It was in August when I saw the barn.

Q. Do you know the value of that barn in your estimation, your opinion, at the time you saw it a month prior. It was burned on the 20th of September, 1941.

Mr. Levit: Just a moment, if the Court please, I object to the question on the ground—of course, I realize it is a preliminary question and calls for a yes or no answer, but I am going to object to this witness giving any testimony as to values. In the first place, he has not been qualified sufficiently as an expert to testify as to values; in the second place, [95] because he has not been shown to have had a sufficient opportunity for observation and has not been shown to have made a sufficient observation of the barn to enable him to place a value on it, so on the two grounds; that is, first upon lack of qualifications as an expert to give testimony, secondly upon lack of his knowledge of the barn in question, we object to any further questions on value of this witness.

Mr. Boyle: With relation to the objection, your Honor, pertaining to his not having opportunity to inspect, not having inspected it, he said he observed the construction of the barn and he gave the size of the timbers and he said he had been in the barn and looked it over, and so far as foundation for expert testimony is concerned, a man with his experience—I could ask further questions on that.

(Testimony of John Feurestein.)

Q. How old are you? A. Forty-one.

Q. How old were you when you first became an apprentice? A. Sixteen years old.

Q. And you took four years, I presume, to learn the business? A. Yes.

Q. That is to qualify as a journeyman?

A. Yes.

Q. And you subsequently became general superintendent. From the time you were 16 up to and including the present time, and also inclusive of that time back on the 20th day of September of 1941, you had been continuously in the building business, is [96] that so? A. Yes.

Q. And have you ever built any barns before?

A. Yes.

Q. Where have you built the barns?

A. I have built barns in Woodlawn, Nebraska, a huge barn which was 135 feet long and 48 feet wide.

Q. Did you build any barns in this county?

A. One south of Reno, a barn 52 feet wide and 60 feet long, which cost \$12,000.

Q. That one you just mentioned, how would that compare with the Questa barn we have been discussing?

Mr. Levit: Objected to as irrelevant.

The Court: Maybe he means size.

Mr. Boyle: Size and also value, too.

The Court: I will sustain the objection as to value, but he can testify as to size and material.

Q. How did it compare in size and construction?

Mr. Levit: Same objection.

(Testimony of John Feurestein.)

The Court: I will allow it.

A. From what I seen of the Questa barn, the Questa barn appeared to me as approximately twice as large, that is in length, as this barn I constructed.

Q. The questions were asked this morning, and argument and objection, as to the matter of depreciation of barns. Do you know anything about depreciation of barns or buildings? [97]

A. Yes.

Q. With relation to a barn like the one you saw on the Questa Ranch, the Questa barn, the question was asked, what would be the depreciation in a year. Could you answer that question? A. Yes.

Mr. Levit: We object to the question and ask the answer be stricken. We object to the question on the ground it is irrelevant and immaterial, calls for conclusion of the witness, and I am going to object to any further questions on the subject of depreciation on the ground the witness has not been qualified properly as an expert.

Mr. Boyle: As far as that is concerned, your Honor, of course that matter is entirely up to the court as to qualifications.

The Court: I do not see what depreciation has to do with it. Can't this witness testify as to how much a barn like this would cost, built in its original state, if he knows?

Mr. Boyle: I asked that only because the question was asked here.

The Court: Yes, counsel did ask, but whether he knew how much a barn depreciates——

(Testimony of John Feurestein.)

Mr. Boyle: He said he didn't know.

The Court: I notice in this photograph—is that corrugated iron on the outside of this barn, or are those slats? [98]

A. Slats.

The Court: The entire barn is of wood?

A. Yes.

The Court: Have you any idea how much lumber there is in it?

A. There is board feet, around 125 to 135 board feet; that is 135 thousand board feet of lumber.

Mr. Levit: May it please the Court, I would like, for the purpose of the record, to move that the answer be stricken and before any questions are put to the witness in connection with the condition of the barn or its construction and the amount of lumber and cost, etc., that we be permitted to examine him further as to his qualifications.

The Court: The only question I asked the witness was how much lumber there was in it. He is qualified to answer that.

Q. (By the Court): What kind of lumber was it?

A. It was pine.

Q. (By the Court): What types of lumber were used in the barn?

A. Mostly dimension lumber. You know 2-inch or heavier is considered dimension lumber.

Q. (By the Court): Mostly lumber 2 inches or larger?

A. No, the floor was one inch also.



(Testimony of John Feurestein.)

Mr. Levit: May it be understood our objection goes——

The Court: You may have objection to the Court's questions. Go ahead.

Q. (Mr. Boyle): What value would you place upon that? What [99] would be your opinion of the value of that building the time you had seen it one month prior to the fire?

Mr. Levit: Objected to on the grounds already stated—the witness has not been qualified to testify to the value of property of this kind, or any kind for that matter; that he has not been shown to have a sufficient familiarity with this barn. The fact he was there on a Sunday afternoon does not qualify him to testify as to cost of construction, and that is the only familiarity that he has showed to have had, the fact that he was in it one Sunday afternoon.

The Court: I think your objection goes to the weight of the testimony. I will overrule. You may answer.

A. Will you state the question again?

Q. In your opinion, what would be the value of that barn we have been discussing, the Questa barn, on the Glendale Road, on the Questa Ranch, at the time you saw it one month prior to the fire?

Mr. Levit: Same objection, and I ask the Court again at this time for permission to cross-examine the witness as to his knowledge of the barn prior to giving any testimony.

The Court: You may examine the witness. Go ahead.

(Testimony of John Feurestein.)

Cross-Examination

By Mr. Levit:

Q. What was the occasion of your visit to the Questa ranch on the Sunday afternoon in question?

A. I am glad you asked that question. I knew Mr. Questa for some time and on many occasions he had invited me out there and asked me to go to the ranch and I love to ride and he said he [100] would be glad to have me come out and he would let me have a horse to go horseback riding, and so upon this Sunday afternoon I was driving in that vicinity and stopped in at the ranch, although Mr. and Mrs. Questa were not there, and after being at the ranch, I noticed the construction of this barn, for the reason that I follow construction, and being it was such a large barn, it naturally drew my attention to go into it, so I went into the barn and looked the barn over.

Q. I see, and how long were you in the barn?

A. Oh, I would say about three-quarters of an hour.

Q. What did you say the construction of the floor was?      A. There is no floor in the barn.

Q. I thought you said it was one-inch flooring?

A. I was referring to the floor overhead.

Q. Oh, I see. What was the condition of that floor?

A. Well, the floor at that time had some boards loose, some boards torn up and I don't know where the boards were or anything. Of course, I didn't examine anything like that. I didn't realize anything like this coming up.

(Testimony of John Feurestein.)

Q. Certainly not. In other words, you just went in there for a casual look around?

A. To look the construction over, for this reason, that that type of construction is being discontinued and has been discontinued for a number of years.

Q. Yes, it is the sort of construction that wouldn't be used today. [101] A. No——

Q. Let me ask you——

Mr. Boyle: Did you want to say something?

A. Because the cost of construction would be entirely too high.

Q. (Mr. Levit): In other words, you could get the same utility, everything, by lower type of construction?

A. That is true, but if that type of barn was built today, I would say that it would cost \$35,000.

Mr. Levit: I ask that the witness' answer be stricken as not responsive.

The Court: It may go out.

Q. Now, Mr. Feurestein, what other buildings did you go into on the ranch?

A. I didn't go into any other buildings on the ranch. The hired man and I were in the barn.

Q. The hired man of Mr. Questa's?

A. Yes, I presume he was the hired man or the caretaker while Mr. and Mrs. Questa were away.

Q. What did you do when you got there?

A. I stopped in there and this man came up and I asked him where Mr. Questa was and he told me Mr. and Mrs. Questa were away for the day.

(Testimony of John Feurestein.)

Q. Is that man in the courtroom?

A. No, I haven't seen him.

Q. Have you seen him since that time?

A. No, I have not. [102]

Q. Do you know his name?

A. No, I do not.

Q. Did you ask his permission to go into the barn?

Mr. Boyle: Objected to as incompetent and immaterial.

Mr. Levit: I think we have a right to find out what he did.

The Court: Well, I don't think so, but I will overrule the objection.

A. I was sitting in my car at the time and we got talking about the barn and I told him it was a huge barn and admired it and he said, "If you wish to, we will go over and take a look at it."

Q. As a matter of fact, you have never had any experience yourself in constructing that type of construction, have you? A. No, not that type.

Q. But as a matter of fact they did not build that type of building in your contracting experience?

A. For this reason, that was before my time, that type of construction.

Q. That is the point. Now, did you go up into the hay loft?

A. No, I did not go up into the hay loft.

Q. Did you look at the construction of these concrete pillars that were there?

(Testimony of John Feurestein.)

A. Yes, the piers.

Q. The piers? A. Yes.

Q. So not going up in the hay loft, it wasn't possible for you to see the construction of the roof?

A. Oh, yes, you could see the construction of the roof looking up; that is, where the boards were torn up.

Q. Oh, there were so many boards torn off you could look up through?

A. I don't know. At an angle you can, of course, you can do that if there is only one board up.

Q. And you say the barn was entirely made of wood? A. Yes, wood construction.

Q. Was there any metal in the barn, to your knowledge, did you see any?

A. Not that I recall.

Q. So that actually you do not know, of your own knowledge, how the roof was put on the barn, do you? A. It was a wood roof.

Q. Oh, it was shingled? You could see from the outside? A. Yes.

Q. But I mean as far as the type of construction, the way the roof and rafters were put together?

A. You could see that up through places where the boards were taken off.

Q. Oh, you could? A. Yes.

Q. But you saw nothing but wood, is that correct? A. You could see the trusses.

Q. The wooden trusses? A. Yes. [104]

(Testimony of John Feurestein.)

Q. Now you said there were some heavy timbers in the barn; I think you said some of them were 10 x 10.      A. 10 x 12.

Q. And some were 8 x 8 and some 6 x 8, I think you said?      A. 6 x 8, yes.

Q. Which timbers were 8 x 8?

A. They had some posts supporting the girders.

Q. Any 10 x 10 timbers corner supports?

A. No, I don't think there was. I don't recall them.

Q. Now you don't know, do you, whether there were metal braces in this building?

A. Yes, I noticed that, but that wasn't the original construction. That was due to remodelling.

Q. Don't you recall that I asked you two or three times whether you saw anything but wood construction and you said no?

A. Well, small braces, these metal angle irons, things of that kind that were put in there afterwards, after the barn was remodelled, which you would notice walking into the barn.

Q. So that if the posts and plates were 10 x 10, you simply didn't notice that, is that correct?

A. Oh yes, you notice those.

Q. You noticed 10 x 10?

A. No, the posts were not 10 x 10. I didn't make that statement.

Q. No, I didn't say you did.

A. I said the posts were 8 x 8. [105]

Q. Now you did not go there with an idea of making an estimate of the construction cost of the barn?      A. No.



(Testimony of John Feurestein.)

Q. You did not go there with an idea of making an estimate of the value of the barn, did you?

A. Well you know being that you follow the building game, you would naturally likely have some——

The Court: That wasn't your purpose?

A. No, that wasn't my purpose, although while I was there I admired and I kind of looked the barn over and to my satisfaction kind of figured out what a barn of that kind would be worth, as any construction man would.

Q. Did you make any notes of your conclusions?

A. No.

Q. When did you first discuss the question of having formed an opinion as to the value of the barn with Mr. Questa or with his attorney or with any one related to them?

A. Just the hired man and I we were referring to.

The Court: He means after this litigation started. Is that what you want to know?

Mr. Levit: Yes.

The Court: When did you first discuss the valuation of the barn?      A. The value?

Q. Yes. A I don't think they ever asked me.

Q. You mean up to the moment you have not been asked as to the value of the barn?

A. No, I have not.

Q. You have not discussed the question of value with Mr. Boyle?      A. Truthfully, no.

Q. Or with Mr. Questa?

(Testimony of John Feurestein.)

A. Mr. Questa referred to it that he thought the barn was worth \$15,000.

Q. Just a moment ago?

A. Just a moment ago.

The Court: You asked him whether he had discussed it?

Mr. Levit: I think you are right.

A. And I told Mr. Questa, I said, "Mr. Questa, if that barn was to be replaced with that type of construction, although it was done before my time——

Mr. Levit: I submit that is not responsive. I asked the witness whether he had talked to Mr. Questa.

The Court: I take it your answer is yes?

A. Yes.

Q. When did you have this conversation with Mr. Qusetta? A. Saturday.

Q. Last Saturday? A. Yes.

Q. So that from August, 1941 until last Saturday you had no occasion to either consider or discuss or refer to the question of the value or construction of that barn, isn't that correct? [107]

A. No, I have talked to Mr. Questa before that time, right after the fire, about the barn, but there was no determination of costs or anything of that kind. The part I recall, at one time there was a remark made——

Q. I am not asking about any of the remarks. I am asking you to tell us when you had these conversations. You say now after the fire.

A. Yes, we talked right after the fire was.

(Testimony of John Feurestein.)

Q. And did Mr. Questa at that time question you with regard to your opinion of the value of the barn?

A. No.

Q. He did not? A. No.

Q. Did he question you with regard to your opinion as to the reconstruction costs of the barn?

A. I do not recall.

Q. Now that was how soon after the fire, Mr. Feurestein?

A. I imagine it was about 30 days after the fire, the first time I talked to Mr. Questa.

Q. So it was before the first trial of this case, was it not? A. I imagine so, I don't know.

Q. Did you, on that occasion, tell Mr. Questa you had been to the barn and seen it about a month before the fire?

A. I told Mr. Questa I had seen the barn.

Q. Did he ask you when?

A. No, at that time he didn't ask me. [108]

Q. So that you had no conversation with him at that time about your visit to the barn?

A. No.

Q. When did you first tell Mr. Questa that you had been to the barn a month before the fire?

A. That I don't know. One thing I can't answer because I can't answer truthfully because for this reason, I don't recall just when and where it was.

Q. How often have you seen Mr. Questa since the fire?

A. Oh, I see Mr. Questa maybe once every two weeks, once a month.

(Testimony of John Feurestein.)

Q. What are your relations other than casual acquaintance? Do you have business dealings?

A. Not at present.

Q. Have you had? A. No.

Q. Ever? A. No.

Q. Never done any work for him?

A. No, I have not.

Q. Purely social? A. Purely social.

Q. Where did you see Mr. Questa?

A. In town, usually around town. Met on the streets different times. When we meet there is no appointment or such, just happen to run into one another. [109]

Q. I take it on these occasions your conversation is purely casual? A. Sure.

Q. And on none of those occasions, up until last Saturday, did Mr. Questa know, as far as you are aware, you had been to the barn a month before the fire? A. Mr. Questa knew before that.

Q. Approximately when did he find that out?

Mr. Boyle: Objected to as calling for conclusion.

The Court: The witness can answer that question. Overruled. A. How is that?

Q. Approximately when did you inform Mr. Questa you had been to the barn and observed it and formed an estimate of its value a month before the fire?

A. That was shortly after the fire I saw him and told him I had been out there and seen the barn.

Q. Did you tell him at that time you had formed an estimate of its value? A. I did not.

(Testimony of John Feurestein.)

Q. You merely told him you had been there and casually viewed the barn?

A. I told him I had seen the barn.

Q. He knew your business? A. Yes.

Q. Did he ask you whether you would be prepared to testify at any time? [110]

A. No, he did not.

Q. He never discussed it with you after that one time? A. No.

Q. When did he first discuss with you the question of your becoming a witness?

A. Saturday.

Q. Last Saturday? A. Last Saturday.

Q. And at that time for the first time Mr. Questa learned that you had an idea of the value of the barn, is that right? A. I presume so.

Q. That was the first time when he learned that you had had anything more than a casual observation of it, is that right?

A. No, I think he knew before that time. Anyway, he knew I had observed the barn before that time.

Q. You say you had been in it before last Saturday? A. Before it burned down.

Q. You were only in it on one occasion however?

A. That is correct.

Q. And he know you had been there on that one occasion? A. Yes.

Q. But prior to last Saturday did he have any knowledge that your knowledge of the barn was anything other than a mere casual passing through?

(Testimony of John Feurestein.)

A. Not that I know of.

Q. Then how did you contact with Mr. Questa last Saturday, go [111] up to him, contact him, or did he contact you? A. Mr. Questa contacted me.

Q. Did he ask you if you knew the value of the barn and would testify?

A. Yes, he asked me whether I was in the barn and if I was sure I was in the barn. If I wasn't sure, he didn't wish me to testify.

Q. And you told him you had been there?

A. Yes.

Q. And that was the first knowledge he had that it was anything more than a casual passing through?

A. Well, I presume so.

Mr. Levit: Well, your Honor, we renew our objection at this time to the witness' testimony, either as to the value or as to reconstruction cost; as to reconstruction cost because the witness does not have a sufficient familiarity with the barn or with this type of construction to qualify him to testify as to reconstruction cost. The witness has testified he himself never built such a barn, never seen such a barn built in his work, it was a type of construction used before he went into contracting.

The Court: I do not think you have to go back and find somebody living in pre-historic days. I will overrule the objection.

Mr. Levit: May I complete my statement?

The Court: Very well. [112]

Mr. Levit: And as to the question of value, that the witness has not been qualified at all as an expert



(Testimony of John Feurestein.)

on values of farm property; that he has been qualified as an expert of certain types of farm property, but not as to value, and in addition I make the same point in regard to his lack of observation.

The Court: The objection will be overruled.

Direct Examination (Continued)

By Mr. Boyle:

Q. Mr. Feurestein, you heard the questions propounded by Mr. Levit when he stated that you only saw wood construction, you heard those questions?

A. Yes.

Q. And you testified yes, you had only seen wood construction. Now if the timbers were of the size that you testified, 8 x 8 and also larger, I believe you said, did you ever see them put together just merely by nails?

A. Oh yes.

Q. But as a matter of fact, aren't they usually put together with long bolts put in on an angle?

Mr. Levit: Objected to as leading and suggestive.

The Court: The witness has already testified to it. I don't think that you have to go over that.

Mr. Boyle: That there were plates, etc.?

The Court: He already said so.

Mr. Boyle: What was that question I asked with relation to value?

The Court: Ask a new one. It will take some time to go back. [113]

Q. Mr. Feurestein, what is your opinion of the value, or what was the value of that barn when you went into it and looked at it? That would be 30 days before the fire or one month before the fire?

(Testimony of John Feurestein.)

Mr. Levit: We object on the grounds he has already stated.

Mr. Boyle: I do not remember asking him.

The Court: Overruled.

A. I would say between 12 and 15 thousand dollars.

Mr. Boyle: You may cross-examine.

The Court: I think counsel has cross-examined on everything except the last question.

Mr. Levit: I was cross-examining only as to observation.

The Court: You make ask any questions you wish.

### Cross-Examination

By Mr. Levit:

Q. Now tell us please approximately how many cubic yards of concrete were there in this barn construction?

A. In that barn there were merely piers in there. I would say there was about 20 cubic yards, if not less.

Q. How many shingles?

A. And shingles, I would say there was about 85 squares of shingles.

Q. What does that mean?

A. Eighty-five squares, that is 4 bunches to the square.

Q. How many thousand, can you put it that way?

A. Well, it would be four times 85—no, 5 bundles to the thousand. [114]

(7) The District Court erred in entering Finding of Fact IX, except that portion of said Finding of Fact which states that supplementary agreements were entered into between the Pacific American Ship-owners' Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Marine Cooks and Stewards Association, dated October 9, 1941, and October 10, 1941, respectively, on the grounds that said finding is immaterial and irrelevant, and not supported by competent evidence.

(8) The District Court erred in entering Finding of Fact X, upon the grounds that the same is immaterial and irrelevant, and that said finding is not supported by competent evidence.

(9) The District Court erred in entering Finding of Fact XI, upon the grounds that the same was immaterial and irrelevant, and that said finding is not supported by competent evidence.

(10) The District Court erred in entering Finding of Fact XII, except that portion of said finding which states that the respondent has paid libelants bonus at the rate of \$80.00 per month from December 7, 1941, to December 29, 1941, upon the grounds that said finding is immaterial and irrelevant and not supported by competent evidence, and contains an erroneous determination of the amount due the libelants.

(11) The District Court erred in entering Conclusions of Law I, II and III.

(12) The District Court erred in entering the Decree awarding each of the libelants the sum of \$288.00.

(13) The District Court erred in failing to enter a decree in favor of the libelant Steeves in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Calgan in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Porter in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and in failing to enter a decree in favor of the libelant Taylor in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and costs in favor of the libelants.

(14) The District Court erred in admitting in evidence respondent's Exhibit "K" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was a document entitled "Statement of Principles," and was adopted at a conference of representatives of steamship companies and maritime unions held in Washington, D. C., December 19, 1941. This exhibit, in substance, provided that it was desirable and necessary that a uniform basis of war bonus and insurance covering the entire maritime industry be reached; that maritime labor give its assurance to the United States Government that they will not strike during the period of war; and steamship companies agree there will be no lock-out; that the utilization of collective bargaining will not be impaired by reason of any act of the conference; that all agreements and

obligations arising out of collective bargaining will not be violated; to provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of war, and to insure application of the maximum war effort; providing for the creation of a proposed maritime war emergency board with the powers set forth in Exhibit "A" attached to said exhibit. Exhibit "A" attached provides that the unions and the vessel operators, having pledged themselves to co-operate in the war effort, it is of importance that means shall be established to insure that questions that may arise which are likely to interrupt the war effort, shall be settled promptly.

Under present conditions, in order to afford a procedure for settling questions relating to war risk compensation and insurance it is proposed there shall be established a board to be known as the Maritime War Emergency Board, which shall consist of three members named by the President. Disputed questions of war risk compensation shall be referred to the Board, and upon notice and hearing, its decision shall be final. Advisory committees of steamship operators and unions are set up. Pursuant to this agreement, on December 19, 1941, President Roosevelt appointed John R. Steelman, Edward Macauley and Frank P. Graham to constitute the Maritime War Emergency Board.

(15) The District Court erred in admitting in evidence respondent's Exhibit "A-5" over libelants' objection that the same was immaterial and irrelevant.



Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-5" was a document dated October 10, 1941, being a supplementary agreement between the Master, Mates and Pilots Association, West Coast Local 90 (representing licensed deck officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for payment to members of the Masters, Mates and Pilots Union of war bonus, at designated rates, and for the payment of bonus during such time as the members of the union were in the war zone. None of libelants were members of this union.

(16) The District Court erred in admitting in evidence respondent's Exhibit "A-6" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-6" was a document dated October 15, 1941, being a supplementary agreement between the Marine Engineers Beneficial Association (the union representing the licensed engineer officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of the libelants were members of this Association.

(17) The District Court erred in admitting in evidence respondent's Exhibit "A-7" over libelants' objection that the same was immaterial and irrelevant.



Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-7" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of

bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12," destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets forth the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the

Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-7" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of

bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12," destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets forth the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the



vessel until the seaman arrives at the port where he is no longer exposed to marine perils, and is subject to the retroactive provisions hereinabove set forth.

(21) The District Court erred in admitting respondent's Exhibit "A-12," to which libelants objected on the ground that the same was immaterial and irrelevant, which objection was overruled, and exception allowed.

Exhibit "A-12" was denominated Maritime War Emergency Board Decision No. 5, and supplements. This exhibit sets forth the procedure whereby an owner or operator of a vessel, sunk by enemy action, shall pay to the seaman, or his dependents, wages and allotments during internment of the seaman. It defines certain classes of dependents which shall receive such allotment in the event no allotment has been made by the seaman. Supplement dated February 6, 1942, provides that the Decision shall be retro-active to December 7, 1941, and further provides that the seaman shall have the right to agree with the ship owner that such seaman shall be paid wages during the period of internment, through the medium of the American Red Cross, or other governmental agency. Amendment to Decision No. 5, also part of this exhibit, dated February 17, 1942, re-states that Decision No. 5 clearly covers vessels in the American Merchant Marine which are sunk or damaged by enemy action, or the destruction of such vessel by any of the United Nations. This amendment sets forth that the Board has given consideration to the continuance of bonus in case of destruction of the vessel, which subject was not covered by Decision No. 5, and adds a number of articles to

Decision No. 5, designating the same as Article No. 6, and providing that where such vessel is lost as the result of enemy action, the war bonus shall continue at the rate which prevailed immediately before loss until the seaman arrives at a port where he is no longer exposed to marine perils. This further provides, however, that the provision of the supplement to Decision No. 5 providing that the terms of the decision shall be retro-active to December 7, 1941, shall be applicable only where there was no agreement with respect to the making of payments provided for or contained in the ship's articles entered into on or before January 10, 1942.

(22) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition over objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Exhibit "A," Mullins' Deposition, was a written proposal by the Masters, Mates and Pilots Association and the Marine Engineers' Beneficial Association, submitted to a conference called by the United States Maritime Commission and the Department of Labor in July and August, 1941, between the American Merchant Marine Institute, representing the Atlantic coast vessels, and the Pacific-American Shipowners' Association, representing the Pacific coast vessels, and the two unions above referred to. This proposal sets forth their demands for bonus in various war areas and the proposed war risk insurance policies covering their members.



(23) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was the agreement entered into on August 16, 1941, between the Marine Engineers' Beneficial Association and the Masters, Mates and Pilots Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association covering the proposed bonuses and wages for the war risk areas defined therein. This exhibit also included a copy of a letter from Admiral Land to Mr. Frank J. Taylor, President of the American Merchant Marine Institute, dated July 22, 1941, calling a conference. The exhibit further included the opening remarks by Admiral McCauley to the members of the conference at the time of their meeting on August 12, 1941, and a request by them to further the war effort.

(24) The District Court erred in admitting Exhibit "C," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. This objection was overruled, and exception allowed.

This exhibit was a form letter from the Secretary of the American Merchant Marine Institute, dated August 18, 1941, addressed to its members, advising them of the result of the meetings with the Masters, Mates and Pilots and Marine Engineers, and the negotiations and agreements entered into between them.

(25) The District Court erred in admitting Exhibit

"D," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a copy of the decision of the National Defense Mediation Board Decision No. 80 of hearings held on September 29th and October 1st, 2nd, 3rd and 4th, 1941, in which the American Merchant Marine Institute, Pacific American Ship-owners Association, Waterman Steamship Corporation, parties on the one side, and the Seafarers' International Union of N. A. and the Sailors' Union of the Pacific were opposing parties. This resulted in certain recommendations by the Board, which, in substance, were as follows: That the crews of American vessels perform an essential role in the national war effort, and that a number of named shipping companies are associated in the American Merchant Marine Institute and the West Coast companies are associated in the Pacific American Shipowners' Association, and the Waterman Steamship Company is not affiliated with either group; that the unlicensed personnel are represented by the S. I. U. and the S. U. P.; that collective bargaining relationships have been established by most owners and one or another of the unions, and for the negotiation of general contract the parties have worked out among themselves appropriate methods. However, a special problem arises from the risk run by men who go to sea in time of war, and it was with this problem that the recommendations are concerned. To cover the bonus which would be fair under present conditions and provide machinery for equitable future bonus, if conditions change, the National Defense

Mediation Board recommends, until changed, bonus rules based on five war risk areas as defined therein, with a further provision that able-bodied seamen shall be paid a bonus of \$80.00 per month in the first four areas and \$33.00 a month in the fifth area. The fourth area covers the trans-Pacific route. Provision is also made for port attack bonuses. The Board further recommends the following machinery for making equitable future adjustment: Any signatory may ask for a change, such request to be made in writing to the other party for whom change is sought, and if an agreement is not reached within one week, the matter be referred to the United States Department of Labor, Division of Conciliation; if not then determined, it may be referred to a Board composed of three members appointed by the President, and such Board shall have power to make recommendations. It further provides that the recommendations relating to the bonus areas shall be effective to November 1, 1942, and that an amendment to November 1, 1943, and during this period there shall be no strike. It is further set forth that nothing in these recommendations shall be interpreted to reduce benefits now existing under collective bargaining contracts, and all the recommendations shall become effective on ships that sail after August 16, 1941, or any earlier effective date set by special rider. If any dispute arise as to the interpretation or recommendations and the parties cannot adjust that dispute by collective bargaining, either party may avail themselves of the arbitration conciliation provisions provided in the recommendations.

(26) The District Court erred in admitting Exhibit "E," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a blank form of supplementary agreement between the National Maritime Union and the name of the company left in blank, bearing date November 6, 1941, which set forth the bonus areas and the rates of bonus.

(27) The District Court erred in admitting Exhibit "F," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a supplementary agreement in blank between the National Maritime Union and unnamed companies, bearing date December 12, 1941, concerning bonus areas and bonus rates.

(28) The District Court erred in admitting respondent's Bryan Deposition-Exhibits "A," "B" and "D" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibits "A," "B" and "D" are the same documents heretofore referred to as Mullins' Deposition-Exhibits "A," "B" and "D," respectively.

(29) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "G" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

This exhibit was the written counter-proposal, dated August 12, 1941, made by the Pacific American Shipowners' Association and American Merchant Marine Institute to the demands of the two unions representing the licensed personnel, which negotiations and conference resulted in a contract heretofore referred to as Respondent's Exhibit "B." These proposals defined the various war risk areas and the bonuses to be paid, and provided for a \$5000.00 war risk insurance for loss of life. This proposal suggested the payment of wages during the period of internment until the officer arrives at a Continental United States port.

(30) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "H" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibit "H" was the war bonus proposal of the Pacific Coast Marine Firemen, Wartetenders and Oilers' Association, dated September 15, 1941, setting forth proposed war bonus areas and the rates to be paid in those areas, requesting war risk insurance, and requesting payment of wages and bonuses in the event of internment until the men arrived at a continental United States port. Requests were also made for insurance on personal effects and for certain meal benefits while awaiting transportation.

(31) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "I" over libelants' objection that it was immaterial and irrelevant. Li-



libelants' objection was overruled, and exception allowed.

This exhibit is a copy of a letter from the Sailors' Union of the Pacific, dated September 10, 1941, directed to the Pacific American Shipowners' Association, setting forth their reasons for a proposed amendment to the current war bonus provisions and submitting certain bonus demands covering particular areas, including a request for the payment of bonus until the member of the union is returned to a home port, and also requesting certain war risk insurance on personnel and property of personnel, as well as increased wages by reason of carrying war cargo.

(32) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "J" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a letter from the Marine Engineers' Beneficial Association, dated October 24, 1941, directed to the American Merchant Marine Institute, calling attention to certain differences in the bonus provisions in the agreements entered into on the Atlantic Coast between the Marine Engineers' Beneficial Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association on the Pacific Coast.

(33) The District Court erred in admitting the testimony of the witness Mullins by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, to which libelants excepted, and exception allowed.



The witness Mullins testified that he was secretary of the American Merchant Marine Institute which is composed of vessel operators of the Atlantic Coast, and that as such he participated in and identified the documents hereinabove referred to in connection with the negotiations conducted between the American Merchant Marine Institute and the National Maritime Union, such negotiations taking place prior to the execution of the shipping articles and rider under which the libelants were employed. The witness also identified and testified concerning the letters written by the American Merchant Marine Institute to its members advising them of the result of the negotiations. He identified National War Labor Mediation Board Decision No. 80, and testified concerning the hearings.

(34) The District Court erred in admitting in evidence the testimony of the witness J. B. Bryan by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

The witness Bryan testified that the Pacific American Shipowners' Association, formed in 1936, acted in labor relations matters between its members and seafaring unions; that commencing in 1939, collective bargaining agreements contained special settlement of war bonus; that because of confusion arising between separate agreements entered into by the various companies following a series of conferences held in Washington, D. C., a uniform agreement with the unions representing the licensed personnel was entered into. Bryan participated in these negotiations,

which were preceded by written demands made by these two unions, which he identified and which were admitted as above set forth. He also identified the same documents testified to by William Mullins in his deposition. He identified the written demands made by the Radio Operators Association, and demands made by the Sailors' Union of the Pacific dated September 16, 1941. He testified concerning the hearing in Case No. 80 before the National Defense Mediation Board covering the general subject matter of war risk and war bonus, which hearing was held in October, 1941, and which resulted in certain written recommendations by the Board. He identified the dates upon which supplementary agreements were entered into between the Pacific Shipowners' Association and the six unions representing sea-going personnel, and testified concerning communications between the Pacific Shipowners' Association and the American Merchant Marine Institute about the possible differences in the language of the contracts, and identified a letter dated October 24, 1941, referred to in Bryan Deposition-Exhibit "J" concerning such differences.

EDWARD J. STEEVES,  
HUGO CALGAN,  
WILLIAM A. PORTER,  
SAMUEL S. TAYLOR,  
Appellants,

By SAM L. LEVINSON,  
Their Proctor.

[Endorsed]: Filed June 15, 1945.

